Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CHARLES MICHAEL PRATER, ET AL.,
Petitioners.

v.

CITY OF BURNSIDE, KENTUCKY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Anthony C. Donahue
Ky. Bar No. 85848
DONAHUE LAW GROUP
410-A South Main Street
Somerset, KY 42501
(606) 677-2741 - Phone

Bryan Scott Hicks
Ohio Bar No. 0065022
260 Northland Blvd
Cincinatti, OH 45246
(513) 772-9002 - Phone

Mathew D. Staver
(Counsel of Record)
Florida Bar No. 0701092
Erik W. Stanley
Florida Bar No. 0183504
Joel L. Oster
Kansas Bar No. 18547
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, FL 32750
(407) 875-2100-Phone

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QUESTIONS PRESENTED

1. Whether a "hybrid rights" exception exists to the rule announced in *Employment Division v. Smith*, 494 U.S. 872 (1990) that a neutral law of general applicability may permissibly burden religious exercise except where a Free Exercise claim is combined with another constitutional claim?

2. Whether the companion claim to a free exercise claim in the "hybrid rights" exception must only be colorable or not frivolous in order to raise the level of constitutional scrutiny?

PARTIES

The Petitioners consist of the pastor and trustees of Main Street Baptist Church, and they include the following: Charles Michael Prater, Pastor, Eugene Hollis, Trustee, and Lynn Sowder, Trustee.

The Respondents include the City of Burnside, Kentucky, and several individuals sued in their official capacities as the Mayor and City Council for the City of Burnside. These individuals include Richard Sadler who was the past Mayor of the City of Burnside, Conrad Bryant, a Burnside City Council member, Henry D. Coffey, a Burnside City Council member, Emma Branum, a Burnside City Council member, Dean Lovins, a Burnside City Council member, Delores Sizelove, a past member of the Burnside City Council and current Mayor of the City of Burnside, and David Brummett, Jr., a Burnside City Council member.

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The opinion of the Court of Appeals (App., 1a - 26a) is reported at 289 F.3d 417. The opinions of the District Court (App., 27a - 47a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was filed on May 7, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Free Exercise, Free Speech and Free Assembly Clauses of the First Amendment, the Fifth Amendment Takings Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The relevant provisions of 42 U.S.C. §§2000cc - 2000cc-5 (the "Religious Land Use and Institutionalized Persons Act of 2000" or "RLUIPA"), which were raised below in this case, are set forth in the Appendix, 48a-56a.

STATEMENT OF THE CASE

This case arises from the decision of the City of Burnside, Kentucky, to open and develop Summit Avenue as a dedicated public roadway across the middle of Main Street Baptist Church's (hereafter "Church") property in order to provide a fifth access to a cemetery owned by the Burnside

Masonic Lodge.

Summit Avenue and U.S. Route 27 run parallel to each other in the City of Burnside, Kentucky. The Church's property begins at U.S. Route 27 and extends to the other side of Summit Avenue. Until 1997, the developed portion of Summit Avenue ended at the parcel of land owned by the Church. Therefore, the Church's property remained whole and was not divided by Summit Avenue. *See* Pictures of property in Appendix, 57a-58a.

The Church owns two parcels of land which were originally divided into eighteen residential parcels. The 1949 plat of the City of Burnside shows that Lot One was further subdivided into nine residential lots and bordered U.S. Route 27. Lot Two was further subdivided into nine residential lots and had no access other than a platted, but not opened or developed, extension of Summit Avenue. This platted extension of Summit Avenue is referred to as "Summit Avenue Extended." Lots One and Two, encompassing all eighteen residential parcels, eventually came to be owned by Joe Jackson who cleared all of the parcels in 1980. When Mr. Jackson cleared the land encompassing the eighteen parcels, there was no road of any kind dividing Lots One and Two.

In 1985, Mr. Jackson conveyed Lots One and Two to the Church. Because the Church, a single owner, now owned all eighteen of the residential lots, there was no need for the platted road to access the "back" nine lots encompassed within Lot Two. The Church abandoned the planned residential development when it purchased Lots One and Two and, instead, made plans to build a House of Worship and parking area. The House of Worship and Parking Area were

to be primarily located on Lot One.

In 1985, the Church applied for a building permit. The Church's design plan would have located the Church building less than 20 feet from the platted Summit Avenue Extended. A City ordinance required at least a 20 foot setback from a roadway for buildings. The Church requested that the City close Summit Avenue Extended but the City refused and brought suit in state court to enforce the setback ordinance. The suit was resolved when the Church dedicated the necessary land from Lot Two to move Summit Avenue Extended far enough away from the Church building to allow a 20 foot setback from the platted, but still unopened and undeveloped roadway. In 1988, the City accepted the rededicated roadway and the re-platted roadway was recorded with the County Clerk's office.

In 1996, at the request of the Masonic Lodge, the City decided to open Summit Avenue Extended to provide another access route for the Masonic Lodge's cemetery that abuts the Church's property. The City informed the Church of its decision in June of 1996, and the Church requested that the City close the roadway. The City placed the plans on hold and invited the Church to present an alternative proposal. However, when the Church was not ready to submit a proposed alternative by November of 1996, the City again communicated its plans to open and develop Summit Avenue Extended.

The Church filed suit in state court requesting a Temporary Injunction against the development of the roadway. The state court granted the City's Motion to dismiss and dismissed the action without prejudice in

February of 1997.

In March of 1997, the Church submitted a proposal to the City for an alternative development of Summit Avenue Extended. The City rejected the proposed alternative and developed Summit Avenue Extended over the Church's property to provide another (fifth) access to the Masonic Lodge's cemetery.

Appendix E contains a picture of the Church's property. (App., 57a). This picture shows the Church building and the now developed Summit Avenue Extended running directly behind the Church. The Masonic Lodge cemetery is to the left of the church building in the picture. The picture clearly shows the split of the Church's property into two parcels, the back parcel being much smaller, and arguably unusable, because of the development of Summit Avenue Extended.

Appendix F contains a picture of the Church property together with the Masonic Lodge cemetery. (App. 58a). The Church is pictured on the right hand side of the Cemetery property which is outlined. Summit Avenue Extended is visible directly behind the Church. Interestingly, this picture shows a direct route of access to the Masonic Lodge cemetery from U.S. Route 27 that provides access to the same point on the cemetery property as does Summit Avenue Extended. Additionally, this picture shows the other four access points to the cemetery excluding Summit Avenue Extended.

In May of 1997, the Church filed the present suit in federal court in the Eastern District of Kentucky. After a period of discovery, both parties submitted cross-motions for

summary judgment. On August 19, 1999, the District Court granted partial summary judgment for the City and dismissed the Church's federal RFRA claim because this Court had declared the federal RFRA unconstitutional as applied to the states. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). The District Court requested additional briefing on the Church's Due Process issues and, after a period of additional discovery, the District Court entered summary judgment for the City on all of the remaining issues on September 28, 2000.

The Church appealed and the Sixth Circuit Court of Appeals affirmed the District Court. The Sixth Circuit specifically rejected the Church's hybrid rights claim, stating, "Finally, this court has rejected the 'assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny.'" *Prater v. City of Burnside*, 289 F.3d 417, 430 (6th Cir. 2002)(App., 19a).

REASONS FOR GRANTING THE PETITION

I.

THE SIXTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THE FIRST, EIGHTH, NINTH, TENTH AND DISTRICT OF COLUMBIA CIRCUITS ON THE ISSUE OF WHETHER A HYBRID RIGHTS EXCEPTION TO *SMITH* EXISTS

In 1990, in the case of *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that the "right of free exercise does not relieve an individual of the obligation to

comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or prescribes).'" *Id.* at 879 (*quoting U.S. v. Lee*, 455 U.S. 252, 263 n.3 (1982)(Stevens, J., concurring in judgment)). However, this Court went on to state that:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press or the rights of parents to direct the education of their children.

Id. at 881 (internal citations omitted). While there was no "hybrid" exception applicable in the *Smith* case, the Court did list several cases in which such a "hybrid" situation existed justifying examination of the restriction on free exercise in those cases under the strictest of scrutiny. *See Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wooley v. Maynard*, 403 U.S. 705 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Since *Smith* was decided, this Court has mentioned the hybrid rights exception to the *Smith* rule three times. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court stated, in describing the application of *Smith* to free exercise claims, "The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court

noted, were cases in which other constitutional protections were at stake." *Id.* at 513-14.

Again, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), Justice Souter, in dissent, describes the "hybrid" exception to the *Smith* rule, stating that the "distinction *Smith* draws [regarding hybrid rights] strikes me as ultimately untenable." *Id.* at 567 (Souter, J., concurring in part and concurring in the judgment).

Finally, this Court cited again to the *Smith* case just last term for the proposition that *Smith* acknowledged the fact that several cases the Court has decided have employed a hybrid rights theory. *See Watchtower Bible & Tract Soc'y. of N.Y., Inc. v. Village of Stratton*, 122 S.Ct. 2080, 2086 n.8 (2002)(citing *Smith*, 494 U.S. at 881).

Beyond mention of the hybrid rights exception to the *Smith* rule of neutral, generally applicable laws, this Court has never squarely confronted a case of a constitutional right conjoined with a free exercise claim since *Smith* was decided. Indeed, this Court never squarely confronted the hybrid rights theory in *Smith* either. Instead, this Court simply acknowledged that it exists in its precedents.

The Sixth Court of Appeals in this case held that there is no hybrid rights exception to the *Smith* rule. The Circuit Court held, "Finally, this court has rejected the 'assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny.'" *Prater v. City of Burnside*, 289 F.3d 417, 430 (6th Cir. 2002)(App., 19a)(*quoting Watchtower Bible & Tract Soc'y. of New York, Inc. v. Village of Stratton*, 240 F.3d

553, 561 (6th Cir. 2001), *rev'd. on other grounds* 122 S.Ct. 2080 (2002)).

The Plaintiffs in this case argued before the Sixth Circuit that the City's decision to open and develop Summit Avenue Extended not only violated their right to free exercise of religion, but also resulted in an unconstitutional "taking" of property in violation of the Fifth Amendment, violated their rights to free speech and assembly, was a violation of the Establishment Clause as it asserted a preference for Masons over the Church, and violated their right to Due Process both substantively and procedurally. The Plaintiffs argued that the existence of these other claims coupled with their free exercise claim mandated that the City's development of Summit Avenue Extended should be evaluated under strict scrutiny. The Sixth Circuit disagreed and stated:

> The Church argued that the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), establishes that strict scrutiny applies where a government act implicates a combination of both the right to the free exercise of religion and any other fundamental constitutional right. ... Finally, this court has rejected the assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny.

Id. at 430 (App., 19a). The Sixth Circuit, therefore, specifically rejected the Church's hybrid rights claims and refused to analyze the City's development of Summit Avenue Extended under strict scrutiny.

The Sixth Circuit has also specifically held two other times that there is no hybrid rights exception to the *Smith* rule. *See Watchtower*, 240 F.3d at 561, *rev'd on other grounds* 121 S.Ct. 2080 (2002)(stating, "In so holding, we reject plaintiffs' assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny.... That language was dicta and therefore not binding."); *see also Kissinger v. Bd. of Trustees of Ohio State Univ. College of Veterinary Medicine*, 5 F.3d 177, 180 (6th Cir. 1993)(refusing to apply strict scrutiny to a hybrid rights claim and refusing to agree that the Supreme Court established a hybrid rights exception to *Smith*.).

This Court has even acknowledged that the Sixth Circuit does not recognize the hybrid rights exception to the *Smith* rule. In reversing the Sixth Circuit just last term, this Court stated, "The Court of Appeals for the Sixth Circuit ... rejected petitioners' reliance on the discussion of laws affecting both the free exercise of religion and free speech in [*Smith*] because that 'language was dicta and therefore not binding.'" *Watchtower Bible & Tract Soc'y. of New York, Inc. v. Village of Stratton*, 122 S.Ct. 2080, 2085-86 (2002)(*quoting Watchtower*, 240 F.3d at 561).

Like the Sixth Circuit, the Second Circuit, while not directly addressing the issue, has indicated that it would refuse to recognize a hybrid rights exception to *Smith*. *See Knight v. Conn. Dep't. of Public Health*, 275 F.3d 156, 167 (2d Cir. 2001)(stating, "Appellants' reliance on *Smith* is misplaced, as the language relating to hybrid claims is dicta and not binding on this court."). The Second Circuit did not directly decide whether it would recognize a hybrid rights exception to *Smith*, but seemed to indicate it would not.

The Sixth Circuit (and to a certain extent the Second Circuit as well) stands in direct conflict with the First, Eighth, Ninth, Tenth and District of Columbia Circuits on this issue.

The First Circuit has recognized a hybrid rights claim as raising the level of constitutional scrutiny. *See Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995). In *Brown*, a challenge was brought by parents and students over a compelled attendance by students at a school assembly where sexually explicit content was presented. The parents and students argued, *inter alia*, that their free exercise rights coupled with the parents' rights to direct the education of their children created a hybrid right that should be evaluated under strict scrutiny. The First Circuit applied the hybrid rights exception to *Smith*, but held that the Plaintiffs' allegations did not bring them within the scope of the hybrid rights exception. *See id.* at 539.

The Eighth Circuit has also specifically applied the hybrid rights exception. *See Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472-73 (8th Cir. 1991). In *Cornerstone*, a church sued arguing that a City zoning ordinance which excluded churches from the commercial and industrial zones of the City violated its rights. The Eighth Circuit stated, "The Church argues that the zoning ordinance... infringes on its 'hybrid rights' to free speech and religion. The Church's claims thus follow the two remaining paths for advancing a free exercise claim after the Court's decision in [*Smith*]." *Id.* at 472. The court went on to discuss free exercise challenges to neutral laws of general applicability, such as zoning ordinances, and stated, "However, the [Supreme] Court left open the viability of free exercise attacks on government actions that directly regulate

religious belief or religious-based conduct, or that violate the first amendment in conjunction with other constitutional protections." *Id.* at 472. The Eighth Circuit then stated that their reversal of the District Court "breathes life back into the Church's 'hybrid rights' claim; thus, the district court should consider this claim on remand." *Id.* at 473.

The Ninth Circuit has also determined that a hybrid rights exception to *Smith* does exist. *See Thomas v. Anchorage Equal Rights Comm'n.*, 165 F.3d 692, 702-07 (9th Cir. 1999) *reh'g granted and rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000). *Thomas* involved a challenge to the City of Anchorage's ordinance forbidding landlords from refusing to rent to unmarried couples. The Plaintiffs argued that the law not only infringed upon their free exercise rights but also upon their Fifth Amendment private property rights and their free speech rights as well. *Id.* at 703. The Ninth Circuit clearly decided that a hybrid rights claim did exist and rejected the Sixth Circuit's "decision to throw up its hands in despair" and refuse to recognize the hybrid rights exception to *Smith*. *Id.* at 703-04.

The Ninth Circuit also decided that a hybrid rights claim exists in an earlier case concerning a challenge brought against the "employer sanction" provision of the Immigration and Reform Control Act. *See American Friends Service Committee Corp. v. Thornburgh*, 961 F.2d 1405, 1408 (9th Cir. 1992), *abrogation recognized on other grounds, Thomas*,165 F.3d 692, 700 n.6 (9th Cir. 1999)(recognizing that *Smith* applies to civil as well as criminal laws). In *American Friends*, the Plaintiff argued that its claim should be evaluated under strict scrutiny because its rights to free exercise of religion and substantive due process were

violated. *Id.* at 1408. The Ninth Circuit recognized that the hybrid rights exception to *Smith* existed, but held that the Plaintiffs did not fall within the exception. *Id*

The Tenth Circuit has recognized the hybrid rights exception as well. *See Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998). The plaintiffs in *Swanson* challenged a school district's refusal to allow homeschool students to attend public school classes part time. The plaintiffs argued that the refusal violated their free exercise rights coupled with their right to raise and educate their children. *Id.* at 699. The Tenth Circuit recognized the hybrid rights exception to *Smith*, but held that the plaintiffs did not make out a hybrid rights claim. *Id.*

Finally, the District of Columbia Circuit has held that the hybrid rights exception to *Smith* does exist. *See EEOC v Catholic Univ. of America*, 83 F.3d 455, 467 (D.C. Cir. 1996). In *Catholic Univ.*, a Catholic nun sued the university where she was employed as a teacher for denying her tenure. She alleged the denial of tenure violated Title VII's prohibition against discrimination based on sex. The District of Columbia Circuit held that the EEOC's attempt to enforce Title VII would excessively entangle the EEOC with religion in violation of the Establishment Clause as well as violate the University's free exercise rights. *Id.* at 467. The court stated as a consequence of both of these rights being burdened, "this case presents the kind of 'hybrid situation' referred to in *Smith* that permits us to find a violation of the Free Exercise Clause...." *Id.*

The Sixth Circuit stands in direct conflict with the First, Eighth, Ninth, Tenth and District of Columbia Circuits on this

issue. This Court should exercise its jurisdiction to resolve this important issue of whether a hybrid rights exception to *Smith* does exist. Addressing such an issue will have a significant impact in this case as the Church's claims would be evaluated under strict scrutiny and the City would be required to demonstrate that its decision to open and develop Summit Avenue Extended is justified by a compelling interest advanced in the least restrictive means available.

II.

THE SIXTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH THE NINTH AND TENTH CIRCUITS CONCERNING WHETHER THE COMPANION CLAIM IN A HYBRID RIGHTS CLAIM MUST BE COLORABLE OR NOT FRIVOLOUS IN ORDER TO RAISE THE LEVEL OF CONSTITUTIONAL SCRUTINY

The Sixth Circuit, by holding in this case that there was no hybrid right exception to *Smith*, sided with the First, Second and District of Columbia Circuits that have held that a companion claim to the hybrid rights exception must be independently viable in order to raise the level of scrutiny to strict scrutiny. By holding that there was no hybrid rights exception to *Smith*, the Sixth Circuit recognized only those claims that are independently viable apart from a free exercise claim. This stands in direct conflict with the Ninth and Tenth Circuits which have held that a companion claim to a hybrid rights claim need only be colorable in order to raise the level of scrutiny to strict scrutiny.

Beyond stating that a hybrid rights exception to *Smith* exists, this Court has never defined the scope or parameters of such a hybrid rights case. Instead, the Circuit Courts have struggled to define the requirements of a hybrid rights claim.

The Ninth Circuit has held that a companion claim to a free exercise challenge in a hybrid rights claim must only "make out a 'colorable claim' that a companion right has been infringed." *Thomas v. Anchorage Equal Rights Comm'n.*, 165 F.3d 692, 705 (9th Cir. 1999), *reh'g granted and rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000). In discussing the nature of the hybrid rights claim, the Ninth Circuit recognized that, "[T]he Supreme Court's repeated references to the Free Exercise Clause in the so-called hybrid cases leave us with little doubt that, whatever else it did, the Court did not rest its decisions in those cases upon the recognition of independently viable free speech and substantive due process rights." *Id.* at 704. The Ninth Circuit outlined Justice Souter's concerns that "the application of the hybrid-rights exception can turn neither upon the fact that a companion right is 'implicated' (else the central holding of *Smith* vanishes) nor upon the existence of a fully protected, independently viable companion right (else the Free Exercise Clause itself vanishes)." *Id.* (explaining *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993)(Souter, J., concurring)). In deciding the nature of the hybrid rights claim, the Ninth Circuit ultimately decided:

> Although we accept Justice Souter's premises, we cannot subscribe to his ultimate conclusion - that the hybrid-rights doctrine is "untenable." Instead, we believe the best understanding of *Smith* suggests an

> approach to hybrid-rights claims that falls somewhere between the two extremes marked out by Justice Souter. That is to say, an individual claiming to be within the hybrid-rights exception may not rest upon a bald assertion that a companion right exists or the fact that a companion right is somehow "implicated" by a government policy. Nor, however, is he required to show that the law he challenges is invalid under a companion provision alone, without regard to the Free Exercise Clause. Like our colleagues on the Tenth Circuit, and like the district court here, we conclude that a plaintiff invoking *Smith's* hybrid exception must make out a "colorable claim" that a companion right has been infringed.

Id. at 705. The Ninth Circuit then went on to hold that, "In order to trigger strict scrutiny, a hybrid-rights plaintiff must show a "fair probability" - a "likelihood" - of success on the merits of his companion claim." *Id.* at 706.

The Ninth Circuit had previously held in accordance with *Thomas* when it held that a companion claim must be "cognizable" in order to raise the level of scrutiny. *See American Friends Service Committee Corp. v. Thornburgh*, 961 F.2d 1405, 1409 (9th Cir. 1992), *abrogation recognized on other grounds, Thomas*,165 F.3d 692, 700 n.6 (9th Cir. 1999)(recognizing that *Smith* applies to civil as well as criminal laws). In *American Friends*, the Ninth Circuit held that a Quaker employer's challenge to the "employer sanction" provisions of the Immigration Reform and Control Act did not fit within the hybrid-rights exception to *Smith* and did not raise the level of scrutiny because "AFSC's challenge to those provisions is not based on any cognizable

constitutional claim; its claim is therefore not 'hybrid.'" *Id.* at 1409.

The Tenth Circuit has also held that a companion claim to a hybrid-rights challenge need only be "colorable" in order to raise the level of scrutiny. *See Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998). *Swanson* involved a challenge to a public school's refusal to allow home-schooled students to attend public school part time. The Tenth Circuit held:

> At a minimum, however, as we stated above, it cannot be true that a plaintiff can simply invoke the parental rights doctrine, combine it with a claimed free-exercise right, and thereby force the government to demonstrate the presence of a compelling state interest. Whatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child.

Id. at 700.

The Tenth and the Ninth Circuit have aligned in their holdings that a hybrid rights challenge must demonstrate only that the companion claim to the free exercise claim is "colorable." These holdings stand in stark contrast to the First, Second, Sixth and District of Columbia Circuit holdings that the companion claim in a hybrid rights challenge must be *independently* viable in order to raise the level of scrutiny.

The First Circuit has held that a companion claim to the free exercise claim must be an "independently protected constitutional protection." *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995). In *Brown*, the plaintiffs alleged that they fell within the hybrid rights exception to *Smith* because the assembly containing sexually explicit dialogue their children were forced to attend violated not only their free exercise rights, but also violated their right as parents to direct the education of their children. *Id.* The First Circuit rejected plaintiffs' arguments stating, "[T]he plaintiffs' allegations of interference with family relations and parental prerogatives do not state a privacy or substantive due process claim. Their free exercise challenge is thus not conjoined with **an independently protected constitutional claim**." *Id.* (emphasis added). According to the First Circuit, the appending claim to a Free exercise claim in a hybrid rights situation must be independently protected or independently viable in order to raise the level of scrutiny to strict scrutiny. Because the plaintiffs' claims in *Brown* did not meet this standard, the First Circuit refused to consider their claims using strict scrutiny.

Like the First Circuit, the District of Columbia Circuit has only recognized a hybrid rights challenge where the companion claim was independently viable. *See EEOC v. Catholic Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996). In *Catholic Univ.*, a nun who was denied tenure at a Catholic University brought suit alleging sex discrimination. The University argued that application of Title VII to itself as a religious university would violate the Establishment Clause and The D.C. Circuit held that the case fell within the hybrid rights exception to *Smith* only after examining the University's Establishment Clause defense and only after

concluding that the Establishment Clause defense was sufficient to affirm the District Court's dismissal of the case. *Id.* at 467. The D.C. Circuit held that its conclusion that the Establishment Clause issue was dispositive of the case was sufficient to "also bring this case within [the] exception to the rule in *Smith*...." *Id.* The D.C. Circuit has only recognized a hybrid rights case where the companion claim to the Free Exercise claim was independently viable.

The Second Circuit Court of Appeals has taken a somewhat different, although still divergent, approach from the Ninth and Tenth Circuits. While not directly deciding the issue, the Second Circuit has indicated that if it does accept a hybrid rights argument, the appending claim to a free exercise claim must be independently viable to raise the level of scrutiny. In *Knight v. Conn. Dep't. of Public Health*, 275 F.3d 156 (2d Cir. 2001), the Second Circuit was asked to decide whether a hybrid rights situation was presented by a nurse and a sign language interpreter for the State who had both been disciplined for discussing their religious beliefs with their clients. The plaintiffs claimed that not only were their free exercise rights violated, but that their free speech rights were violated as well. *Id.* at 167. The Second Circuit stated, "In this Circuit we have not yet addressed generally whether hybrid claims require a greater governmental justification than each component of the hybrid claim taken seprarately...." *Id.* The Second Circuit went on to state, "The allegation that a state action that regulates public conduct infringes more than one of a public employee's constitutional rights does not warrant more heightened scrutiny than each claim would warrant when viewed separately." *Id.* The court then went on to hold that because the public employee's free speech claims were analyzed under *Pickering v. Board of*

Education of Township High School District No. 205, 391 U.S. 563 (1968), and because *Pickering* does not mandate the application of strict scrutiny to evaluate public employees' free speech claims, then the level of scrutiny was not raised to strict scrutiny.

Implicit within the Second Circuit's holding is a recognition that the appending claim to a hybrid rights challenge must be independently viable in order to bring it within the hybrid rights exception to *Smith*. This is the logical result of the Second Circuit' discussion of the hybrid rights exception. If, as the Second Circuit held, the hybrid rights claim is not judged under any stricter standard than the appending claim is judged under, then there is no need for a hybrid rights exception. A party can simply bring a claim under the companion claim and not bother with the free exercise claim because it doesn't get the party anything greater than what it already has without it. In short, the Second Circuit has seemed to ally itself with the First and District of Columbia Circuits, and the Sixth Circuit in this case, which rest the hybrid rights challenge on the independent viability and scrutiny afforded to the companion claim.

In the present case, the Church raised several different challenges to the City's decision to open and develop Summit Avenue Extended. The Church raised a Fifth Amendment Takings claim arguing that the City took its property without just compensation. The Circuit Court ultimately rejected all of the Church's arguments on this claim and stated, "This conclusion leaves the Church **without any viable claim** that the City took the Church's property when it developed the dedicated roadway." *Prater v. City of Burnside*, 289 F.3d 417,

427 (6th Cir. 2002)(App., 12a) (emphasis added). The Sixth Circuit thus recognized that a claim appended to a free exercise claim in a hybrid rights challenge must be independently viable in order to raise the level of scrutiny. There was no decision by the District Court or the Sixth Circuit that the Church's takings claim was not colorable. Indeed, no serious argument could be made that the Church's takings claim was not colorable because, in fact, it was colorable.[1] This should have been sufficient to raise the level of scrutiny under a hybrid rights theory to strict scrutiny and to require the City to demonstrate a compelling interest advanced in the least restrictive means for its decision to open and develop Summit Avenue Extended.

The Church also raised a Due Process claim alleging that the City deprived it of substantive and procedural due process because the City's decision to open and develop Summit Avenue Extended was arbitrary and irrational and because the City rejected the Church's alternative proposal to develop Summit Avenue Extended without a fair and open hearing. Additionally, the Church also raised a Free Exercise claim that the City's decision to develop Summit Avenue Extended in favor of the Masonic cemetery intentionally discriminated against the Church by favoring the Masonic cemetery over the Church. The Church also raised an Establishment Clause argument that the City's preference of the Masonic lodge over

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[1] If the Church's takings claim was not colorable, the District Court should have dismissed it outright. Instead, the District Court and the Sixth Circuit confronted it on the merits and decided the takings claim against the Church. Simply because a party loses on the merits of a claim does not mean that its claim is therefore not colorable.

the Church violated the Establishment Clause. The Circuit Court ultimately rejected these claims, as the District Court did, but rejection of these claims does not mean that they are not colorable. Indeed, each of the claims brought by the Church certainly passes the colorable standard.

This Court has defined "colorable" in several different contexts. In the habeas corpus context, this Court has stated that a prisoner filing a successive petition must demonstrate a "colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). The Court went on to explain that "colorable" means that the prisoner must at least demonstrate a "fair probability... that the trier of facts would have entertained a reasonable doubt of his guilt." *Id.* at 454 n.17.

Additionally, the Court has held that a defendant seeking discovery on a selective prosecution claim must show a "colorable basis" for the claim. *United States v. Armstrong*, 517 U.S. 456, 468 (1996). In defining the contours of the colorable basis standard, this Court held that a "colorable basis" at least "require[s] some evidence tending to show the existence of the essential elements of the defense." *Id.* at 468.

In a somewhat different context, this Court has held that a successful defendant in a civil rights action brought pursuant to Title VII may be awarded attorneys' fees and costs against a plaintiff if the plaintiff's claim was "frivolous, unreasonable or groundless." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). This standard tracks the "colorable" standard by requiring a plaintiff to have at least a colorable basis for bringing a civil rights action. The opposite of unreasonable or groundless is that the claim is reasonable

and has at least some basis in law or fact. The Court's guidance on this standard is helpful and applicable in the present case. This Court stated:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. at 421-22.

Taking this admonition and applying the "colorable" standard to the Church's claims in this case, it is clear that the Church at least raised a "colorable" claim justifying the application of the hybrid rights standard and an elevation of the level of scrutiny in this case to strict scrutiny. The Defendants would not be entitled to attorneys' fees and costs assessed against the Plaintiffs in this case under the *Christiansburg* standard and it is clear that each of the Plaintiffs' claims were sufficient to meet the "colorable"

standard regardless of the fact that they were ultimately rejected by the District Court and the Sixth Circuit. Indeed, the District Court in this case only rejected the Plaintiffs' claims in this case after extensive briefing by the parties and after re-briefing on Plaintiffs' Due Process claims. *See Prater*, 289 F.3d at 423 (App., 5a).

Holding, as the Sixth Circuit implicitly did in this case, that the companion claim to a free exercise claim in a hybrid rights case must be independently viable leads to the absurd conclusion that this Court abrogated the Free Exercise Clause of the First Amendment when it decided *Smith*. If the companion claim is independently winnable apart from the free exercise claim, then a litigant has no incentive to bring a free exercise claim and the Free Exercise Clause is rendered a nullity. Additionally, holding that a companion claim to a free exercise claim in a hybrid rights case must be independently viable also implicitly overrules and conflicts with this Court's decisions in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wooley v. Maynard*, 403 U.S. 705 (1977); and *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). This Court certainly did not overrule these cases in *Smith*, but instead recognized that they presented a hybrid rights case justifying the application of strict scrutiny. This Court should grant the Petition in order to overturn the Sixth Circuit's implicit refusal to recognize that a companion claim to a free exercise claim in a hybrid rights case must only be colorable and not frivolous in order to raise the level of scrutiny to strict scrutiny. Any other holding is out of step and in direct conflict with this Court's precedents as well as the Ninth and Tenth Circuit precedents.

The Sixth Circuit has seemingly allied itself with the First, Second and District of Columbia Circuits which stand in direct conflict with the Ninth and Tenth Circuits as well as this Court's precedents. This Court should exercise jurisdiction in this case in order to resolve the split among the Circuit Courts on this important issue.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

Anthony C. Donahue
DONAHUE LAW GROUP
410-A South Main Street
Somerset, KY 42501
(606) 677-2741 - Phone

Bryan Scott Hicks
260 Northland Blvd
Cincinatti, OH 45246
(513) 772-9002 - Phone

Mathew D. Staver
(Counsel of Record)
Erik W. Stanley
Joel L. Oster
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, FL 32750
(407) 875-2100-Phone

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 00-6538

CHARLES MICHAEL PRATER; EUGENE HOLLIS; AND LYNN SOWDER,

PLAINTIFFS-APPELLANTS,

V.

CITY OF BURNSIDE, KENTUCKY; RICHARD SADLER; CONRAD BRYANT; HENRY D. COFFEY; EMMA BRANUM; DEAN LOVINS; DELORES SIZELOVE; AND DAVID BRUMMETT, JR.,

DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Eastern District of Kentucky at London.
No. 97-00241--Jennifer B. Coffman, District Judge.

Argued: March 22, 2002
Decided and Filed: May 7, 2002

Before: NORRIS, SILER, and GILMAN, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge. The Main Street Baptist Church, through its pastor and trustees, brought suit in federal district court against the City of Burnside, Kentucky, as well as against the City's mayor and several council members, asserting claims pursuant to 42 U.S.C. §§ 1983 and the Religious Freedom Restoration Act (RFRA). These claims arose from the City's decision to develop a previously dedicated roadway located between two lots owned by the Church. Both parties moved for summary judgment. The district court granted summary judgment in favor of the City on the Church's §§ 1983 claim and dismissed sua sponte the Church's RFRA cause of action for failure to state a claim upon which relief may be granted. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

Summit Avenue is a dedicated public roadway that runs in a north-south direction within the City. This roadway has long been developed north of its intersection with Central Avenue. But the portion of Summit Avenue that runs south of Central Avenue was not developed until 1997. The development of this portion of Summit Avenue, referred to by the parties as "Summit Avenue Extended," gives rise to the present controversy.

Summit Avenue Extended and U.S. Route 27 run parallel

to each other south of Central Avenue, with U.S. Route 27 lying to the east of Summit Avenue Extended. The Church owns a lot that lies between the two streets (Lot 1). Central Avenue marks the northern boundary of Lot 1. The Church also owns a second lot that abuts the western side of Summit Avenue Extended (Lot 2). Central Avenue marks the northern boundary of Lot 2 as well. The Burnside Masonic Lodge owns a large lot that abuts both the western edge of U.S. Route 27 and the southern boundary of Lots 1 and 2, on which the Lodge operates the Burnside Cemetery. Summit Avenue Extended terminates at the northern boundary of the Cemetery.

A 1949 plat of the City shows that Lots 1 and 2 had once been planned as a residential development, with each lot subdivided into nine individual parcels. Summit Avenue Extended would have provided the only street access to the Lot 2 parcels. The Church, however, abandoned the planned residential development when it acquired Lots 1 and 2 in 1985. It intended to locate its building and parking area on Lot 1, with Lot 2 reserved for future expansion.

The Church's design plan located its building near the western boundary of Lot 1, less than 20 feet from Summit Avenue Extended. A City ordinance, however, requires that structures be located at least 20 feet from a public roadway. To avoid violating this ordinance, the Church requested that the City close the dedicated roadway for Summit Avenue Extended and thus allow the Church to consolidate Lots 1 and 2.

The City refused the request, and subsequently brought suit in state court to enforce the above-referenced ordinance. This suit was resolved after the Church dedicated the land necessary to move the roadway for Summit Avenue Extended

several feet to the west, which gave the Church's building the necessary clearance from the planned roadway. The City approved the rededication of Summit Avenue Extended in 1988. Its suit against the Church was then dismissed for failure to prosecute in 1989.

In June of 1996, the City adopted a resolution to proceed with the development of Summit Avenue Extended. The purpose of the development was to provide direct public access to a shelter being constructed within the Cemetery. This shelter, located near the point where Summit Avenue Extended terminates at the Cemetery's northern boundary, is designed to facilitate grave-side funeral services.

The City informed the Church of the resolution in late June of 1996. This led the Church to once again request that the City permanently close Summit Avenue Extended. The City then put the development of Summit Avenue Extended on hold and invited the Church to submit an alternative proposal. By November of 1996, however, the Church had not yet responded. Instead, the Church sought a temporary restraining order in state court.

The Church's complaint alleged that the proposed development of Summit Avenue Extended would violate various provisions of the United States and Kentucky Constitutions, as well as RFRA, 42 U.S.C. §§§§ 2000bb-2000bb-4. In November of 1996, the state court issued a temporary restraining order that prohibited the City from developing Summit Avenue Extended. One month later, however, the court granted the City's motion to dissolve the restraining order. The court then granted the City's motion to dismiss the Church's complaint in February of 1997, which, over the City's objection, was dismissed without prejudice.

In March of 1997, the Church finally submitted a formal

proposal for an alternative route of access to the Cemetery shelter. This proposal was rejected by the City the following month. The City began the development of Summit Avenue Extended shortly thereafter.

In May of 1997, the Church, through its pastor and trustees, brought the present lawsuit against the City, as well as against the City's mayor and several council members, in the United States District Court for the Eastern District of Kentucky. The Church asserted claims pursuant to 42 U.S.C. §§ 1983, RFRA, and various provisions of the Kentucky Constitution. In suing under §§ 1983, the Church alleged that the City had violated the Free Exercise, Free Speech, Freedom of Assembly, and Establishment Clauses of the First Amendment, the Takings Clause of the Fifth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Both the City and the Church filed cross-motions for summary judgment. In August of 1999, the district court granted partial summary judgment to the City on the basis that the Church had failed to establish any violation of the First Amendment. Recognizing that the United States Supreme Court had declared RFRA unconstitutional, the court also dismissed the Church's RFRA claim for failure to state a claim upon which relief may be granted. After receiving additional briefing from the parties, the court granted summary judgment to the City on the remainder of the Church's §§ 1983 claim in September of 2000. Having dismissed all of the Church's federal claims, the court declined to exercise pendent jurisdiction over the Church's state-law claims.

The Church now appeals. First, the Church maintains that it offered sufficient evidence to sustain its claim under §§

1983, relying specifically on the City's alleged violations of the Takings Clause, Free Exercise Clause, Establishment Clause, and Due Process Clause. Second, the Church argues that it has established a violation of RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§§§ 2000cc-2000cc-5.

II. ANALYSIS

A. Standard of review

This court reviews de novo the district court's grant of summary judgment. *Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000). Summary judgment is proper where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A genuine issue for trial exists only where there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

The district court's dismissal of a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is also reviewed de novo. *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), *overruled on other grounds by Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992 (2002). When deciding whether to dismiss a claim under Rule 12(b)(6), "[t]he court must construe the complaint in a light most favorable to the plaintiff, and accept all of [the] factual allegations as true." *Id.* (citation omitted). A claim should not

be dismissed "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Buchanan v. Apfel*, 249 F.3d 485, 488 (6th Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

B. 42 U.S.C. §§ 1983

The Church maintains that the district court erred in granting the City summary judgment on the Church's claim under 42 U.S.C. §§ 1983, a statute that provides recovery for constitutional deprivations incurred under the color of state law. According to the Church, the City violated several constitutional provisions when it chose to develop rather than permanently close Summit Avenue Extended. Each of these alleged violations is analyzed below.

1. Takings Clause

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. This restraint on the power of the government to take private property, made applicable to the states through the Fourteenth Amendment, *Phillips v. Washington Legal Found.*, 524 U.S. 156, 163 (1998), is "designed to bar [the government] from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (internal quotations marks and citation omitted).

In the present case, the Church alleges that the City engaged in an unconstitutional taking when it developed Summit Avenue Extended. The Church must establish two elements to prove its case. Specifically, the Church must

show that the City (1) "took [the Church's] property" and (2) "failed to compensate [it] justly or failed to put the property to public use." *Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987).

The Church, therefore, cannot recover under the Takings Clause without first proving that the City took property that belonged to the Church when the City began to develop Summit Avenue Extended. Determining whether the City took the Church's property requires us to look beyond the Takings Clause, which protects rather than creates property rights. *Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000). We must instead assess the Church's purported property interest in Summit Avenue Extended in light of "existing rules or understandings that stem from an independent source such as state law." *Calvert Invs., Inc. v. Louisville & Jefferson County Metro. Sewer Dist.*, 847 F.2d 304, 307 (6th Cir. 1988) (internal quotation marks omitted).

Under Kentucky law, the dedication of a public roadway is governed by Kentucky Revised Statutes §§ 82.400. This statute provides that a party may dedicate a public roadway by submitting a plat that depicts the proposed dedication to a city's legislative body. Ky. Rev. Stat. §§ 82.400(1). If that body approves the dedication, the plat is recorded in the county clerk's office and the dedication is complete. *Id.*

The Church followed the procedure outlined above when it "rededicated" Summit Avenue Extended in 1988. In particular, the Church submitted a plat that depicted the movement of Summit Avenue Extended several feet to the west, a relocation that allowed the Church to construct its building in compliance with the City ordinance requiring structures to have at least 20 feet of clearance from a public

roadway. The City approved the dedication of Summit Avenue Extended as depicted in the plat, which was later recorded in the county clerk's office.

Section 82.400(1) does not indicate whether the dedication of a public roadway vests the public entity with title to the roadway, nor have we found any Kentucky caselaw that interprets this aspect of the statute. *See* 23 Am. Jur. 2d *Dedication* §§ 59 (1983) ("The effect of a statutory dedication, or the extent of the estate conveyed thereby, is generally indicated by the statute itself, according to which the fee may pass to the public . . . or may remain in the dedicator . . . ."). Under some dedication statutes, a dedication confers only an easement to use the dedicated land for a public purpose. *Id.* A valid statutory dedication, however, generally "vests the fee in the dedicatee in trust for the public . . . ." *Id.* But even if we assume that the City acquired only an easement to use the dedicated land for a public purpose, the Church still fails to establish an unlawful "taking" on the part of the City.

To prove its full ownership of Summit Avenue Extended, the Church first contends that the City's easement terminated when the Church acquired Lot 2 in 1985. The Church points out that Summit Avenue Extended would have provided the only street access to the residential parcels that were originally planned to be subdivided from Lot 2. Once those residential parcels were "consolidated" by the Church, the public need for Summit Avenue Extended allegedly "dissipated." This meant, according to the Church, that "the easement was gone as well." Relying on *City of Louisville v. Louisville Scrap Material Company*, 932 S.W.2d 352 (Ky. 1996), the Church maintains that it reacquired full ownership of Summit Avenue Extended upon the termination of the alleged easement. *Id.* at 355 (holding that when property

condemned for public use is no longer used for a public purpose, the real property "revert[s] to the owner in fee simple").

The critical flaw in the Church's argument is that the realignment of Summit Avenue Extended took place in 1988, three years after the Church acquired Lot 2. In other words, the Church gave the City the right to use Summit Avenue Extended for a public purpose *after* the Church consolidated the nine residential parcels for which the roadway would have provided the only street access. Consolidation of those residential parcels in 1985, therefore, did not terminate the City's interest in the realigned roadway dedicated by the Church three years later.

The fact that Summit Avenue Extended was rededicated in 1988 is also fatal to the Church's abandonment argument. Citing *Sarver v. County of Allen*, 582 S.W.2d 40, 42-43 (Ky. 1979), the Church contends that a public road in Kentucky is abandoned if not used by the public for a period of 15 or more years. The Church maintains that, since it first appeared on a plat of the City in 1902, Summit Avenue Extended was never used by the public. Thus, the Church argues, ownership of Summit Avenue Extended passed to the owners of the property abutting that roadway many years ago, and now belongs to the Church. But even assuming that Summit Avenue Extended had been abandoned in its former location, the Church cannot plausibly argue that Summit Avenue Extended has been abandoned since its rededication in 1988, because 15 years had not elapsed prior to the roadway's development in 1997.

The Church nevertheless contends that even if the City did not surrender its interest in the roadway prior to 1997, its rights terminated when the City decided to develop Summit

Avenue Extended for the alleged private benefit of the Burnside Masonic Lodge. According to the Church, the City developed Summit Avenue Extended solely to provide additional street access to the privately owned Cemetery. The Church maintains that the development of a roadway with such a limited use does not serve any public purpose, and therefore goes beyond the scope of the City's interest in Summit Avenue Extended. As support for its argument, the Church relies upon the following language from *Prestonia Area Neighborhood Association v. Abramson*, 797 S.W.2d 708 (Ky. 1990):

> If public use were construed to mean that the public would be benefitted in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.

Id. at 711 (quoting *Chesapeake Stone Co. v. Moreland*, 104 S.W.2d 762, 765 (Ky. 1907)).

The above-quoted language explains the rule in Kentucky that prohibits "the taking of private property for the purpose of transfer to another private enterprise." *Id.* In the present case, however, the City has not transferred title to the Summit Avenue Extended roadway to the Cemetery. Summit Avenue Extended is not a private driveway for the Cemetery, but is instead a public roadway that any member of the public

is free to use. Indeed, the Church itself may use the roadway for a rear entrance to Lot 1 or for a front entrance to Lot 2. Furthermore, the fact that Summit Avenue Extended currently runs only to the Cemetery does not deprive the roadway of its public character, because use of the roadway is not limited to members of the Lodge, but is in fact open to all members of the general public. The Kentucky Court of Appeals recognized this principle in *Sturgill v. Kentucky Department of Highways*, 384 S.W.2d 89 (Ky. 1964), when it explained that

> [a]ny public way naturally confers a special benefit on those persons whose property adjoins it. All roads terminate somewhere. Dead end streets or highways inevitably and particularly subserve the private interests of the last property owner on the line. Yet the public has an interest in reaching other members thereof.

Id. at 91.

Summit Avenue Extended, therefore, has been developed for a public purpose. This conclusion leaves the Church without any viable claim that the City took the Church's property when it developed the dedicated roadway. Accordingly, the Church cannot establish a violation of the Takings Clause.

2. Free Exercise Clause

The Free Exercise Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), "forbids all laws 'prohibiting the free exercise' of religion." *McDaniel v. Paty*, 435 U.S. 618, 620 (1978) (quoting U.S. Const. amend. I). This Clause protects not only

the right to hold a particular religious belief, but also the right to engage in conduct motivated by that belief. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (recognizing that "the exercise of religion often involves not only belief and profession but the performance of (or abstention from) physical acts . . .") (internal quotation marks omitted).

The Church maintains that the City violated its rights under the Free Exercise Clause by choosing to develop instead of permanently closing Summit Avenue Extended. It argues that the City prevented the Church from following the "will or calling of God." The Church interprets this calling to require the expansion of the Church's facilities onto the Summit Avenue Extended dedicated roadway.

Whether the Free Exercise Clause protects a religious institution's desire to fulfill what it perceives as its spiritual duty to construct facilities on a dedicated public roadway is a question of first impression. We, of course, will not question "the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Nevertheless, "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)); *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999) (relying upon this principle in rejecting a free exercise challenge to a state statute that, under certain circumstances, authorized the payment of public funds to private educational institutions so long as the institution was nonreligious).

The Free Exercise Clause, therefore, does not entitle a religious organization to special benefits. *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 701 (10th Cir. 1998)

(concluding that the Free Exercise clause did not entitle children who were home-schooled for religious reasons to attend public school on a part-time basis when other home-schooled children were precluded from doing so). Accordingly, the City's refusal to abandon the dedicated public roadway in favor of the Church did not, in and of itself, burden the Church's rights under the Free Exercise Clause.

The Church, however, claims that the City engaged in religious discrimination when it developed rather than closed Summit Avenue Extended. A government act that discriminates against a particular religion triggers the protections of the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs . . . ."). The question, then, is whether the City in fact engaged in religious discrimination.

According to the City, resolving this issue is simply a matter of determining whether the City's decision with regard to Summit Avenue Extended was neutral on its face. But "[f]acial neutrality is not determinative . . . ," because "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534. We must therefore consider whether the City, in developing rather than closing Summit Avenue Extended, intentionally sought to burden the Church's religious activities.

In the Church's view, the City chose to develop Summit Avenue Extended in order to favor the interests of the Burnside Masonic Lodge, the owner of the Cemetery, over the interests of the Church. The Church contends that this alleged favoritism is significant for purposes of the Free Exercise Clause because, unlike the Church, the Burnside Masonic

Lodge is a non-Christian religious organization. It argues that, by allegedly giving preferential treatment to the Burnside Masonic Lodge, the City demonstrated its discriminatory animus toward the religious beliefs and practices of the Church.

The development of Summit Avenue Extended did in fact provide a benefit to the Burnside Masonic Lodge to the extent that the roadway now allows the Lodge to better serve those who visit its Cemetery. But the ultimate beneficiary of this development is the general public, which now has increased access to the Cemetery and, in particular, to the shelter erected on the Cemetery property for grave-side funeral services. In contrast, closing Summit Avenue Extended would have benefitted only the Church without providing any comparable benefit to the general public.

The Church, therefore, is asking us to infer a discriminatory intent on the part of the City based upon the fact that, in the course of furthering the public interest, the development of Summit Avenue Extended happened to conflict with what the Church sincerely believes is its spiritual duty. Discrimination may not be inferred, however, simply because a public program is incompatible with a religious organization's spiritual priorities. The Free Exercise Clause "does not . . . offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours." *Lyng*, 485 U.S. at 452. As the Supreme Court has explained, government acts often inadvertently frustrate certain citizens' "search for spiritual fulfillment," yet the government "simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.*

The Church, therefore, must show more than disparate

impact in order to prove discriminatory animus on the part of the City. It attempts to meet this burden by relying upon evidence that, in the Church's view, shows that the City (1) closed roadways on behalf of the Burnside Masonic Lodge and (2) violated Kentucky law in the manner in which the City rejected the Church's alternative to the development of Summit Avenue Extended. This evidence is examined below.

The Church first claims that the City has favored the Burnside Masonic Lodge in deciding whether to accept or reject requests for roadway closures. To support this allegation, the Church relies upon a comparison between two ancient plats affecting the Cemetery. The first plat, dated in 1902, shows three dedicated public roadways running through the Cemetery. These roadways do not appear on a 1949 plat of the City, the most recent one available. The Church maintains that the City's decision to close roadways for the Burnside Masonic Lodge while refusing to extend the same benefit to the Church manifests its discriminatory animus toward the Church.

Even assuming that, at some point in the distant past, the City closed roadways at the request of the Burnside Masonic Lodge, this would not necessarily give rise to an inference of present discrimination. An inference of religious discrimination based upon disparate treatment requires evidence that a party was treated differently from a *similarly situated* party with a different religious affiliation. *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 934 (6th Cir. 1991) (holding that the plaintiff could not sustain a free exercise challenge to a policy requiring students transferring to public school to pass a test before receiving credit for courses studied at home "[a]bsent evidence that similarly situated transferees from nonreligious home schools were provided an 'exemption' which [the plaintiff] was not . . .").

Yet the Church offers no evidence showing that, in terms of the parties' requests for roadway closures, it was similarly situated in either time or circumstances with the Burnside Masonic Lodge.

Specifically, the Church sought the closure of Summit Avenue Extended after the Burnside Masonic Lodge had requested that the roadway be developed to provide better public access to the Cemetery's shelter. Closing Summit Avenue Extended, therefore, would have required the City to forgo the public benefit associated with the roadway's development in order to allow the Church to pursue its expansion plans. The record contains no evidence as to whether the Burnside Masonic Lodge had asked the City to surrender any similar public benefit when it allegedly sought the closure of the roadways that had run through the Cemetery many decades ago. Absent additional evidence regarding the circumstances surrounding these earlier closures, an inference of present discriminatory animus on the part of the City is unwarranted.

The Church next maintains that the manner in which the City rejected its proposed alternative to developing Summit Avenue Extended shows the City's discriminatory animus toward the Church. In particular, the Church alleges that the City rejected its proposal during a meeting of the City Council that was held in violation of the Kentucky Open Meetings Act. This statute requires that the meetings of city governing bodies be "open" and "public." Ky. Rev. Stat. §§ 61.810(1). The City, on the other hand, contends that its mayor rather than the City Council made the decision to reject the proposal, and that the mayor's decisionmaking process need not be open and public.

Neither party offered evidence to support its allegation

regarding which arm of the City's government decided to reject the Church's proposal. We are thus unable to conclude whether the City reached its decision in violation of the Kentucky Open Meetings Act. Nevertheless, even assuming that such a violation occurred, this fact alone would not support an inference of religious discrimination on the part of the City. *See Schatzman v. County of Clermont*, No. 99-4066, 2000 WL 1562819, at *6 (6th Cir. Oct. 11, 2000) (unpublished table decision) (concluding that a departure from the prescribed procedure for reviewing an employee's performance did not, in and of itself, support an inference that the employee's termination was based upon discrimination rather than just cause); *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1039 (10th Cir. 1993) (expressing "significant doubts" as to whether the plaintiff offered sufficient evidence to establish a prima facie case of religious discrimination pursuant to Title VII where the plaintiff failed to offer evidence showing that the procedural irregularities in his performance review "were connected to the alleged discrimination").

The Church has thus failed to raise a genuine issue of material fact as to whether the City engaged in religious discrimination when it chose to develop rather than close Summit Avenue Extended. As a result, the Church cannot show that the City's decision implicated its rights under the Free Exercise Clause.

This conclusion also disposes of the Church's claim that the City violated its "hybrid rights," a term that the Church uses to describe a combination of its rights under the Free Exercise, Free Speech, and Freedom of Assembly Clauses of the First Amendment, as well as the Takings Clause of the Fifth Amendment. The Church argues that the Supreme Court's decision in *Employment Division v. Smith*,

494 U.S. 872 (1990), establishes that strict scrutiny applies where a government act implicates a combination of both the right to the free exercise of religion and any other fundamental constitutional right. But absent a violation of the Free Exercise Clause, the Church's hybrid-rights theory necessarily fails. Furthermore, as explained above in Part II.B.1., the Church has not shown that a genuine issue for trial exists regarding any violation of the Takings Clause. Nor does the Church offer any legal authority or compelling argument to explain how the City's refusal to allow the Church to expand its facilities on a dedicated public roadway implicates either the Free Speech or Freedom of Assembly Clauses. Finally, this court has rejected the "assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 240 F.3d 553, 561 (6th Cir.), *cert. granted*, 122 S. Ct. 392 (2001).

3. Establishment Clause

The Establishment Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, *Widmar v. Vincent*, 454 U.S. 263, 271 n. 8 (1981), provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. This Clause, among other things, prohibits the government from preferring one religion over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

In the present case, the Church alleges that the City violated the Establishment Clause in deciding to develop rather than close Summit Avenue Extended. The Church

maintains that, in making this decision, the City discriminated against the Church and in favor of the Burnside Masonic Lodge. It further contends that the Burnside Masonic Lodge is a religious organization that adheres to the "religion" of Masonry. The Church, therefore, concludes that the City's alleged discrimination runs afoul of the Establishment Clause's prohibition of discrimination among religions.

To prove this alleged violation of the Establishment Clause, however, the Church relies upon the same evidence that it offered in support of its claim that the City violated the Free Exercise Clause. This evidence, as explained above in Part II.B.2., is insufficient to raise a genuine issue as to any discriminatory animus on the part of the City. Accordingly, even assuming that the Burnside Masonic Lodge is a non-Christian religious organization, the Church cannot establish a violation of the Establishment Clause.

4. Due Process Clause

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §§ 1. This Clause clothes individuals with the right to both substantive and procedural due process. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (analyzing the Due Process Clause of the Fifth Amendment). Substantive due process "prevents the government from engaging in conduct that shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty . . . ." *Id.* (internal quotation marks and citations omitted). Procedural due process requires that the government's deprivation of life, liberty, or property, even if consistent with substantive due process, "be implemented in a fair manner." *Id.* (internal quotation marks and citation omitted).

In the present case, the Church alleges that the City developed Summit Avenue Extended in violation of the Church's due process rights, both substantive and procedural. With regard to its right to substantive due process, the Church contends that the City's decision to develop the roadway was arbitrary and irrational. The Church maintains that this decision also violated its right to procedural due process, because the City allegedly rejected the Church's proposed alternative to developing Summit Avenue Extended without conducting a fair and open hearing.

To establish either a substantive or procedural due process violation, the Church must first show that the City deprived it of a constitutionally protected liberty or property interest. *Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 167, 172 (4th Cir. 1988) ("[I]n order to claim entitlement to the protections of the due process clause--either substantive or procedural--a plaintiff must first show that he has a constitutionally protected liberty or property interest . . . and that he has been deprived of that protected interest by some form of state action . . . .") (internal quotation marks and citations omitted). "Liberty interests that are protectible under the due process clause can arise either directly from the Constitution, or indirectly from the laws of the states." *Williams v. Vidor*, 17 F.3d 857, 864 (6th Cir. 1994) (Jones, J., dissenting). Protected property interests, however, do not arise from the Constitution, but instead "stem from an independent source such as state law." *Leis v. Flynt*, 439 U.S. 438, 441 (1979) (per curiam) (internal quotation marks and citation omitted).

The Church contends that the City's development of Summit Avenue Extended deprived the Church of its "religious" liberty interests; namely, the liberty interests

created by the Free Exercise and Establishment Clauses of the First Amendment. As explained above in Parts II.B.2. and II.B.3., however, the Church has failed to raise a genuine issue as to whether the development of Summit Avenue Extended violated its rights under either of these Clauses. This failure leads to the conclusion that the City has not deprived the Church of any liberty interests created by the Free Exercise and Establishment Clauses. *See Doswell v. Smith*, No. 94-6780, 1998 WL 110161, at *6 (4th Cir. March 13, 1998) (unpublished table decision) (holding that the plaintiff's procedural due process claim, based upon the deprivation of his liberty interests under the Free Exercise Clause, was "subsumed" within his free exercise claim because "if the [free exercise] claim failed, so must the due process claim . . .").

The Church next maintains that the City has deprived it of a protected property interest, arguing once again that the Summit Avenue Extended roadway belongs to the Church. But as explained above in Part II.B.1., any reversionary property interest that the Church might have in Summit Avenue Extended is subject to the City's superior right to develop the dedicated roadway for a public purpose. We have previously determined that the City in fact developed Summit Avenue Extended for a public purpose, thus foreclosing the Church's claim of any right to the roadway property.

Accordingly, the Church has not met its burden of showing a deprivation of any constitutionally protected liberty or property interest. As a result, the Church cannot establish a violation of its substantive or procedural due process rights. We thus conclude that the district court did not err in granting summary judgment in favor of the City on the Church's claim under 42 U.S.C. §§ 1983.

C. RFRA, as amended by RLUIPA

In its complaint, the Church also asserted a claim against the City pursuant to RFRA, which provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the burden "is in furtherance of a compelling governmental interest . . ." and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1. Less than two months after the Church filed its complaint, however, the Supreme Court declared RFRA unconstitutional. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). The district court thus dismissed the Church's RFRA claim for failure to state a claim upon which relief may be granted.

After the district court dismissed the Church's RFRA claim, and just eight days before the court issued its final judgment in the present case, Congress amended RFRA with its enactment of RLUIPA. *Dilaura v. Ann Arbor Charter Township*, No. 00-1846, 2002 WL 273774, at *5 (6th Cir. Feb. 25, 2002) (per curiam) (unpublished table decision) (pointing out that RLUIPA amended RFRA in September of 2000). RLUIPA provides in pertinent part as follows:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that

compelling governmental interest.

42 U.S.C. §§ 2000cc(a)(1)(A), (B). On appeal, the Church maintains that the City's decision to develop rather than close Summit Avenue Extended violated RLUIPA.

Because RLUIPA amended RFRA, we may construe the Church's RLUIPA claim as an extension of its RFRA claim. *Dilaura*, 2002 WL 273774 at *6 (allowing the plaintiffs to pursue their RFRA claim under the standards set forth in RLUIPA). Applying RLUIPA in the present case, moreover, does not implicate the general presumption against the retroactive application of statutory law, because the Church is seeking an injunction that would prohibit the City from "using" Summit Avenue Extended in the future. *Id.* at *7 ("Injunctive relief is prospective, not retroactive.") (citing *Kikumura v. Hurley*, 242 F.3d 950, 960 n.5 (10th Cir. 2001) (holding that the application of RLUIPA was not retroactive where the plaintiffs sought injunctive relief)).

But the Church may not rely upon RLUIPA unless it first demonstrates that the facts of the present case trigger one of the bases for jurisdiction provided in that statute. *Dilaura*, 2002 WL 273774 at *8 (examining whether the plaintiffs' allegations satisfied one of the jurisdictional bases of RLUIPA before remanding the case for the district court to address the merits of the RLUIPA claim). RLUIPA, by its terms, applies only in a case where:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with

> foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
>
> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. §§ 2000cc(a)(2)(A), (B), (C).

The Church contends that the City's decision to develop rather than close Summit Avenue Extended substantially burdened its religious exercise in the manner set forth in §§ 2000cc(a)(2)(C). Specifically, the Church maintains that the City's decision involved the implementation of a land use regulation that allowed the City to make an individualized assessment of the proposed use of the property involved. The City, on the other hand, argues that its decision to develop the dedicated roadway did not implement a land use regulation as defined by RLUIPA.

RLUIPA defines a "land use regulation" as follows:

> [A] zoning or landmarking law . . . that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

Id. at §§ 2000cc-5(5). Under this definition, a government agency implements a "land use regulation" only when it acts pursuant to a "zoning or landmarking law" that limits the

manner in which a claimant may develop or use property in which the claimant has an interest.

The applicability of RLUIPA in the present case, therefore, turns on whether the City acted pursuant to a zoning or landmarking law when it chose to develop rather than close Summit Avenue Extended. As explained above in Part II.B.1., the City obtained its original interest in Summit Avenue Extended long before the Church acquired the adjacent property in 1985. The City later acquired its interest in the realigned roadway upon the rededication of Summit Avenue Extended by the Church. This property interest gave the City the right to choose whether to develop Summit Avenue Extended. The City's decision regarding the fate of the roadway was thus not based upon any zoning or landmarking law restricting the development or use of the Church's own private property.

Accordingly, RLUIPA is inapplicable to the factual circumstances in the present case. We therefore conclude that the district court did not err in dismissing the Church's RFRA claim. In light of this conclusion, we need not address the City's argument that RLUIPA is unconstitutional. *Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."). Nor do we need to rule on the federal government's motion to intervene in the present case in order to defend RLUIPA's constitutionality. The government's motion is thus denied as moot.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 97-241

CHARLES MICHAEL PRATER, et al.,
PLAINTIFFS,
vs.
CITY OF BURNSIDE, KENTUCKY, et al.
DEFENDANTS.

ORDER

This matter is before the court upon the plaintiffs' motion for oral argument and on the parties' cross-motions for summary judgment.[2] The court, having reviewed the argument of counsel and being otherwise sufficiently advised, will grant the motion for an oral argument and will grant in part defendants' motion for summary judgment.[3]

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[2]During oral argument, the Court erroneously stated that this matter was before the Court on the defendants' motion for summary judgment. The plaintiffs also had filed a motion for summary judgment, which this Court has carefully considered.

[3]Oral arguments in this case were held telephonically on August 12, 1999.

The plaintiffs, the pastor and trustees of Main Street Baptist Church (the Church), and the defendants, the mayor and council members of the City of Burnside (the City), are embroiled in an ongoing dispute over Summitt Avenue, which runs through the Church's property and provides access to the adjacent Burnside Cemetery. The first known recorded plat for the City of Burnside is dated October 2, 1902 and was recorded on November 24, 1949 by the Pulaski County Court Clerk. The Burnside Cemetery and Summitt Avenue both appear on the plat. The cemetery is operated by a six-member committee comprised of three members of the Burnside Masonic Lodge and one member of each of the three original churches in the City. The Burnside Cemetery serves as a final resting place for individuals of various faiths and denominations, and individuals need not espouse a particular religious belief to be interred there at death. Although the public may enter the cemetery through other roads and inlets, Summitt Avenue grants access to a funeral shelter built by the local Masonic Lodge and other interested citizens.

In its early life, Summitt Avenue provided access to nine residential lots, several of which were later deeded to the Church. The Church received the property at issue in 1985 and later that year requested that the City close Summitt Avenue and issue a building permit for the construction of Church facilities. The City conducted a public hearing, which included Church representatives, on November 25, 1985. The City granted the Church a variance for the construction of Church facilities, but rather than closing Summitt Avenue, moved the street a few feet to accommodate the Church's construction. The facilities were constructed so as to abut the road, now limiting the Church's plans to expand their existing facilities.

In 1986, the City filed suit against the Church, alleging that the Church's building was encroaching on Summitt Avenue; the Church filed counterclaims. The Pulaski Circuit Court, however, dismissed the suit without prejudice in 1989 for lack of prosecution after it appeared that the parties had settled their disputes. In 1996, the City approved the development of Summitt Avenue Extended, increasing the public's use of the road, sparking ongoing state-court litigation. While that litigation continued, the Church requested that the City consider a proposed alternative route and tendered a proposal to the City. The Church offered to deed the necessary amount of land to the City and to construct a new road, located that the back of the Church's property, away from the Church buildings. The City rejected the Church's proposal and explained that the Church's proposed road did not meet the surface and structural requirements that must be met by any new road, but not by then-existing roads such as Summitt Avenue. Shortly thereafter, the City began the leveling and development of Summitt Avenue Extended.

Religious Freedom Restoration Act

The plaintiffs allege that the City's actions violate the Religious Freedom Restoration Act of 1993. That act has been declared to be unconstitutional. *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). Accordingly, the plaintiff's claims brought under that act will be dismissed for failure to state a claim.

Free Exercise

The Church argues that the City has impermissibly

burdened its and its member's right to free exercise of religion as guaranteed by the First Amendment to the United States Constitution. The crux of the Church's claim is that the City's refusal to move the road has curtailed the Church's long-term building development plans, interfering with its sacred duties of stewardship and obedience and service to God. The City counters that its actions do not deny or infringe upon the protected rights of the Church and that the Church is only being denied its efforts to acquire government property. Rather, it continues, the City's management of the road has been guided by and in accordance with facially neutral, generally applicable laws and ordinances concerning zoning and public roads.

The Free Exercise Clause of the First Amendment prohibits the government from regulating religious beliefs and from imposing special restrictions on individuals or groups because of their religious beliefs. *See Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 1599 (1989). "The government may not compel affirmation of religious belief, punish the expression of religious beliefs it believes to be false, [or] impose special disabilities on the basis of religious views or religious status." *Id.* Thus, governmental regulation of religious beliefs as such patently offends the Constitution. *Id.* The First Amendment also safeguards the right to perform or to abstain from physical acts that are a part of the exercise of religion. *Id.* The protection afforded religious practices by the Free Exercise Clause, however, is more limited than the protection of religious beliefs.

The First Amendment is not offended if the exercise of religion is affected merely as the incidental effect of a

facially neutral and generally applicable law. *Id.* at 878, 1600. Hence:

> [While] indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject or scrutiny under the First Amendment... [this] does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals to acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.... Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action of a religious objector's spiritual development.

Thus, a facially neutral, generally applicable law "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babula Aye v. City of Hileah,* 508 U.S. 520, 531, 113 S.Ct. 2217, 2227 (1993). The Free Exercise Clause will pertain if the object of a law "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. Conversely, an individual's religious beliefs will not remove him from the purview of a facially neutral, generally applicable law. *See Smith*, 494 U.S. at 877.

Here, in order for the City's actions regarding the road to interfere unconstitutionally with the Church's or its members' right to free exercise of religion,[4] the ordinances in question must either fail to be facially neutral or to the extent that those ordinances provide the City with discretion in their application, the City must have applied those ordinances in a manner intended to interfere with the plaintiffs' free exercise of their religious beliefs because of the religious nature or content of those beliefs. *See Church of the Lukumi Babulu Aye*, 508 U.S. at 520. During oral argument, the plaintiffs conceded that the ordinances authorizing the challenged actions of the City are facially neutral and those ordinances' underlying purposes are equally neutral. The plaintiffs have failed to introduce any evidence that the zoning board's decision to reject the Church's proposed solution was intended to burden the free exercise of religion. *See e.g. Mount Elliott Cemetery Assoc. v. City of Try*, 171 F.3d 398 (6th Cir. 1999). Therefore, as the only basis for the plaintiffs' Free Exercise claim is that they are subject to a facially neutral, generally applicable zoning ordinance, the defendants' motion for summary judgment will be granted.

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[4]For purposes of the motions before it, the court will assume that the religious practices and beliefs at issue are validly held religious beliefs. The court does so to circumvent the judicial quagmire of evaluating whether the plaintiffs' religious beliefs are sincerely held or fully central to their religion, an approach that "cannot be squared with the Constitution." *Lyng*, 485 U.S. at 457-458. "[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of a particular litigants' interpretations of those creeds." *Smith*, 494 U.S. at 887.

Establishment Clause

The Church argues that the City's maintenance of the road at issue and its refusal to move the road violates the Establishment Clause of the First Amendment because the road leads to the Burnside Cemetery, in which the Masons, another religious organization, are involved.

Government actions challenged under the Establishment Clause are reviewed under the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971). In examining such issues, federal courts look to "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Agnosti v. Felton*, 521 U.S. 203, 231, 117 S.Ct. 1997, 2015 (1997). Government hostility to religious organizations is not required by the Establishment Clause. Rather, the government must act in a neutral manner that neither inhibits nor advances religion. Indeed, "policies providing incidental benefits to religion do not contravene the Establishment Clause." *Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 768, 115 S.Ct. 2440, 2449 (1995).

Here, the City's action cannot be said to foster an impermissibly close relationship between church and state or to provide more than an incidental benefit to a religious organization. The City's only action has been to allow an arguably religious organization[5] the continued benefit of

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[5]The plaintiffs argue that the Masons must be considered a religious organization and proffer evidence which suggest that

public access to its property via a long-established public thoroughfare. The Masons are not the exclusive users of the Cemetery and are no more benefitted by the road than the public at large. The Cemetery lies open to the entire public, both living and dead. Its governing board is religiously diverse, including Masons as well as representatives from several historic area churches of different denominations. The Establishment Clause is not violated if, as here, a benefit incidentally flows to a religious organization. For example, the state may provide funding to a hospital which, while founded by the Catholic church, provides services to the community at large. *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988), *citing Bradfield v. Roberts*, 175 U.S. 291 (1899). Therefore, the defendants' motion for summary judgment will be granted as to this claim.

Freedom of Speech and Association

In their complaint, the plaintiffs raise several claims stemming from the infringement of their rights to freedom of association and freedom of speech, separately and in conjunction with their other First Amendment claims. The plaintiffs argue that the City's zoning ordinance and its application in this case restrict their freedoms of speech and assembly because the presence of Summitt Avenue has interfered with the planned construction of additional church facilities. In other words, the plaintiffs argue that the City's zoning ordinances and their application in this case

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the Masons do have some characteristics of a religious organization. It appears, however, that Masonic membership is not contingent upon a member being, for example, a Lutheran rather than a Baptist.

unconstitutionally interfere with their First Amendment right to freedom of speech and assembly.

While "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment ... content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). *See also United States v. O'Brien*, 391 U.S. 367, 377 (1968). Here, the challenged ordinances and zoning decisions are clearly content-neutral. The ordinance does not purport to "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *City of Renton*, 475 U.S. at 48-49. It is not the case that the City's laws regarding the grading of streets or platting of deeds target only those seeking to advance the Church's views, stating, for example that only the roads traversing land owned by Baptist churches must meet certain grading requirements.[6] Instead, the City's zoning laws appear to focus on controlling and directing the City's growth and development in a manner beneficial to the public welfare.

Having determined that the challenged regulations are content-neutral time, place, and manner restrictions, "the appropriate inquire in this case ... is whether ... the

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[6]Indeed, the City's zoning board issued a variance to allow the Church to construct its facilities on land zoned for residential use, obviously a decision supportive of the Church.

[ordinance] is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication." *City of Renton*, 475 U.S. at 50. Both the Supreme Court and the Sixth Circuit have recognized that zoning ordinances further substantial government interest. *See Id; Easlick v. City of Lansing*, 875 F.2d 863 (6th Cir. 1989). The ordinances challenged here advance the substantial governmental interests of regulating traffic, regulating and controlling growth, and providing access to public areas. The ordinances also provide reasonable alternative means of communication. The church may revise its construction that will allow them to build their desired facilities. *See generally, Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewook, Ohio*, 699 F.2d 303 (6th Cir. 1983) (finding no First Amendment Free Exercise violation where City refused to rezone church property, zoned as residential, or to grant a variance allowing construction of any church facilities on church property when the City's action completely foreclosed the church's chosen use for the land). Accordingly, as the Church has not shown any First Amendment violations, the court will grant the defendants' motion for summary judgment.

Due Process Clause

The Church suggests that it was denied both procedural and substantive due process of law in its interactions with the City. The parties are instructed to submit stipulated facts and memoranda of law addressing the plaintiff's due process claims within ten days of entry of this order. No extensions will be granted. Due to this open question of law, the court cannot fully grant summary judgment for the defendants.

State Law Claims

The plaintiffs have brought numerous state law property and constitutional law claims. The court will not address those claims at this time. Accordingly,

IT IS ORDERED that the defendants' motion for summary judgment is **GRANTED** as to the plaintiffs' claims brought under the First Amendment.

IT IS FURTHER ORDERED that the parties are to file within 10 days of the entry of this order memoranda of no more than 10 pages addressing the plaintiffs' claims brought under the Due Process Clause. Each party may file a reply brief no later than September 8, 1999. No extensions will be granted.

This is the 19th day of August, 1999.

/s JENNIFER B. COFFMAN
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION
CIVIL ACTION NO. 97-241

CHARLES MICHAEL PRATER, et al.,
PLAINTIFFS,
V.
CITY OF BURNSIDE, KENTUCKY, et al.,
DEFENDANTS.

ORDER

This matter is before the court upon the joint status report (Record No. 64) submitted by the parties, which the court construes as reactivating the cross-motions for summary judgment (Record Nos. 42, 44). The court having considered the record and being otherwise sufficiently advised, the defendants' motion will be granted and the plaintiffs' motion will be denied.

Factual Summary

This litigation was spawned by the decision of the City of Burnside (the City) to expand Summitt Avenue, a public road traversing the property of the plaintiffs (the Church). In its early life, Summitt Avenue provided access to nine residential lots, several of which were later deeded to the Church. Summitt Avenue appeared on the first known

recorded plat for the City of Burnside, dated October 1902, and the road appeared again on city zoning plans dated 1949. The Burnside Cemetery also appears on the plat and the plans. The cemetery is operated by a six-member committee comprised of three members of the Burnside Masonic Lodge and one member of each of the three original churches in the City. The Burnside Cemetery serves as a final resting place for individuals of various faiths and denominations, and individuals need not espouse a particular religious belief to be interred there at death. Although the public may enter the cemetery through other roads and inlets, Summitt Avenue provides a road that does not intersect with a major thoroughfare. Summitt Avenue grants access to a funeral shelter built by the local Masonic Lodge and other interested citizens.

The Church received the property through which Summitt Avenue runs in 1985, and shortly thereafter the Church requested that the City close Summitt Avenue and issue a building permit for the construction of Church facilities. The City conducted a public hearing, which included Church representatives, on November 25, 1985. The City granted the Church a variance for the construction of Church facilities, but rather than closing Summitt Avenue, it moved the street a few feet to accommodate the Church's construction. The facilities were constructed so as to abut the road, not limiting the Church's plans to expand their existing facilities.

On June 3, 1996, at a regularly scheduled monthly meeting, the Common Council of the City of Burnside (the Council) unanimously approved a plan to develop a portion of Summitt Avenue, known as Summitt Avenue Extended.

On June 28, the City advised the Church of the planned development. Several days later the Council accepted a bid of $3,773.30 for the planned construction. The Council held a special meeting to discuss development of the road on August 12. Representatives of the Church attended the meeting and after the development was discussed - - including the possibility of alternative routes - - the City agreed to delay development of Summitt Avenue to allow the Mayor to meet with the City's contractor to compare costs of alternative plans. On September 9, the Mayor directed the City Clerk to arrange a meeting with the contractor and representatives of the City Council, of the Masonic Lodge, and of the Church and to report back at the Council's October meeting.

At the regularly scheduled meeting of October 7, the Council discussed the development of alternative routes and advised the Church that it would not spend more on the alternative route, put by some estimates at between $10,000 and $30,000, than the original plan. Another meeting between the parties was scheduled for October 14. On November 4, the Church proposed the creation of an alternative route on its property, but provided no total costs, bid, or construction time frame. At the Church's request, the matter was continued until November 18. On November 18, the Council held a specially called meeting to consider any final, detailed proposals from the Church for alternative road construction. The Church did not present a plan and requested a thirty-day extension. From the summarized minutes of these various meetings, it appears that Church representatives were present and allowed to participate in the meetings.

The Church filed a motion for a temporary restraining

order on November 20, 1996, originating litigation in Pulaski Circuit Court. Although the temporary restraining order was entered at this time, it was dissolved on December 4, 1996, accompanied by a denial of the Church's request for further injunctive relief. The action ultimately was dismissed from the state court's docket without prejudice, a ruling that was appealed but affirmed by the Kentucky Court of Appeals. At the close of litigation, the City agreed to abstain from further development of Summitt Avenue Extended until March 31, 1997 to allow the Church to present an alternative route proposal. On April 7, the Church presented an alternative route that was inconsistent with City regulations for roads. The Church was notified by letter of the rejection of its proposal and the commencement of Summitt Avenue Extended's development on April 15, 1997.

There is no genuine issue of material fact.

Legal Analysis

The only federal issues which remain in this case are the Church's procedural and substantive due process claims. As both parties acknowledge, the first step in evaluating potential violations of due process rights is to determine whether a constitutionally protected property or liberty interest exists. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-71 (1972). Moreover, this determination must be made with regard to "existing rules or understandings that stem from an independent source such as state law." *Id.* at 577.

The Church alleges a property interest in Summitt Avenue Extended by asserting that, as a matter of state law,

it is the fee simple owner of the street by virtue of the City's abandonment. In support of this proposition, the Church cites *City of Louisville v. Louisville Scrap Material Co*, 932 S.W.2d 352 (Ky. 1996). That case is distinguishable on its facts, in that it involved an easement acquired by the city through condemnation and conveyed to a railroad for municipal purposes; when the railroad ceased to use the property for a public purpose (constituting abandonment), it reverted to the city. Here, there is no allegation that the City acquired Summitt Avenue from anyone through condemnation, nor has Summitt Avenue (or Summitt Avenue Extended) ceased to be accessible by the public.

The best guidance this court can get regarding Kentucky law's stance on the Church's claims, however, is from the state court which examined them in an earlier action. Although the Pulaski Circuit Court dismissed the case without prejudice, its findings underpinning the denial of temporary and permanent injunctions for the Church are nevertheless informative. The state court found that Summitt Avenue was a platted roadway, open to the public, and was dedicated to purchasers and the public in general; therefore, municipal authorities may assume control of the dedicated roadway at any time. *See Shurtleff v. City of Pineville*, 217 S.W.2d 976 (1949) ("When streets are set apart and dedicated to the public use .... [there is no] period fixed by statute or judicial ruling in which a street so dedicated must be taken possession of but the city or improved by it in order to prevent an abandonment.") Moreover, the court found that the Church's only property rights in and to Summitt Avenue were rights of access or to use the street the same as other citizens. *See Wessels Construction and Development Co. v. Commonwealth of Kentucky*, 560 F.Supp. 25 (E.D. Ky. 1983).

The court further noted that, absent the passing of a city ordinance, it could not close the road. Agreeing with this analysis, this court finds that the Church fails to establish a property interest in Summitt Avenue Extended based on its alleged ownership of the street in fee simple.[7]

The plaintiffs acknowledge that their claimed liberty interests stem from the First Amendment and equivalent provisions in the Kentucky Constitution. This court did not specifically address the Kentucky constitutional provisions in its last ruling on the motions for summary judgment, and would not address them here except as they relate to the federal due process claim. This task is somewhat difficult, however, as the Church has not pleaded these provisions explicitly as establishing liberty interest within the meaning of due process; they are referred to summarily in the Church's memorandum on the subject, directing the court to the original complaint. The complaint, in turn, addresses "religious freedom under the Kentucky Constitution," citing sections 1, 5, and 8. The extent of the plaintiffs' pleading here consists of quoting the language of these provisions and concluding that the city's "actions or omissions as applied to Plaintiffs, interferes [sic] with and controls the rights of conscience in matters of religion and prevents, rather than protects, religious worship." Although the liberty guaranteed

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[7]To the extent the Church alleges a property interest in the form of its own opportunity to develop Summitt Avenue, or to have it closed so as to expand Church facilities, the standard is not met. "To have a property interest ... a person must have more than an abstract need or desire for [the property]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim or entitlement to it." *Roth*, 408 U.S. at 577.

by the Fourteenth Amendment includes the right "to worship God according to the dictates of [one's] own conscience," see *Roth*, 408 U.S. at 572, the Church has cited no law, from Kentucky or elsewhere, indicating that its request regarding Summitt Avenue Extended rises to the level of this right. Thus, the plaintiffs have failed to establish a liberty interest within the meaning of due process.[8]

Finally, even if this court were to find that the plaintiffs had established property or liberty interests within the meaning of due process, the procedure afforded them was adequate.[9] "The fundamental requirement of due process is

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[8]To the extent the Church's complaint cites other provisions of the Kentucky Constitution, these appear to relate to its claim of a property interest; as the court has already dismissed this claim in accordance with Kentucky law, there is no need to discuss these provisions further.

[9]The Church acknowledges that the primary case to be addressed with regard to its substantive due process claim is *City of Louisville v. Louisville Scrap Material Co.*, 932 S.W.2d 352 (Ky. 1996). The court has already discussed and distinguished this case. The court's finding that Summitt Avenue has been and will continue to be a platted roadway, accessible to the public, and that the Burnside Cemetery serves the public rather than one particular denomination, disposes of the substantive due process claim; the action of the City in developing the street is rationally related to a legitimate governmental interest. The Church's interest in Summitt Avenue Extended is tenuous at best, and the evidence does not support the plaintiffs' contention that the City acted arbitrarily or used its governmental power for purposes of oppression. *See Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996).

the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The plaintiffs correctly cite this and other platitudes of procedural due process law; beyond these general statements, however, their argument collapses. The Church's fundamental misconception is that the relevant "action" by the City in this case involved the Church's alternate proposal; rather, the action to be scrutinized under due process principles is the unanimous resolution (initially approved June 3, 1996) to develop Summitt Avenue Extended. With regard to this action, the Church was given notice (by letter on June 28, 1996), numerous opportunities to make oral presentations of alternate proposals, and the right to be represented by counsel. Indeed, the plaintiffs do not really take issue with the hearings afforded them. Rather, they base the lion's share of their procedural due process claim on an alleged "secret meeting" of the City Counsel which they think "must have" occurred sometime between their public hearing on April 7 and their notification of their proposal's rejection on April 15, 1997. The Church has presented no evidence that any such meeting ever took place; they hinge its existence on the language of their two-sentence notification, "[p]lease be advised that the City of Burnside has **decided** to proceed with the development of Summitt Avenue. Please advise your client that the road surface is going to be developed" (Record No. 61, at 7). The rest of the Church's argument requires this Court to assume that such a meeting did, in fact, exist, and further find that it did not comport with the procedural requirements of due process.[10]

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[10]The Church's memorandum also invites this court to analyze whether the procedures used or omitted by the Council violated any number of Kentucky statutes, including the Kentucky

This evaluation misses the mark. The Church was able to present its alternate proposal at a public meeting of the Council, after notification of the proposed development of Summitt Avenue. The Council took no action on the alternate proposal, electing instead to proceed with the panned development. Nothing in procedural due process law indicates that the plaintiffs were entitled to additional procedural safeguards beyond those which they were afforded in this case. The evidence shows that the elements of procedural due process were met. At any rate, this procedural analysis is triggered only when the plaintiffs are able to demonstrate a property or a liberty interest within the protection of the Fourteenth Amendment; the Church has failed to meet this standard. Accordingly,

IT IS ORDERED that the defendants' motion for summary judgment is **GRANTED** as it relates to all remaining federal claims of the plaintiffs.

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that, the court having dismissed all federal claims before it, any pendent state law claims remaining are **DISMISSED** for lack of a subsisting federal claim.

This is the 28th day of September, 2000.

Open Meetings Act. The court declines to engage in such a task, as it is unnecessary to the disposition of this federal due process claim.

/s JENNIFER B. COFFMAN
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

APPENDIX D

42 U.S.C. §2000cc

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. §2000cc-2

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. §2000cc-3

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise

than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

42 U.S.C. §2000cc-4

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

42 U.S.C. §2000cc-5

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or

landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

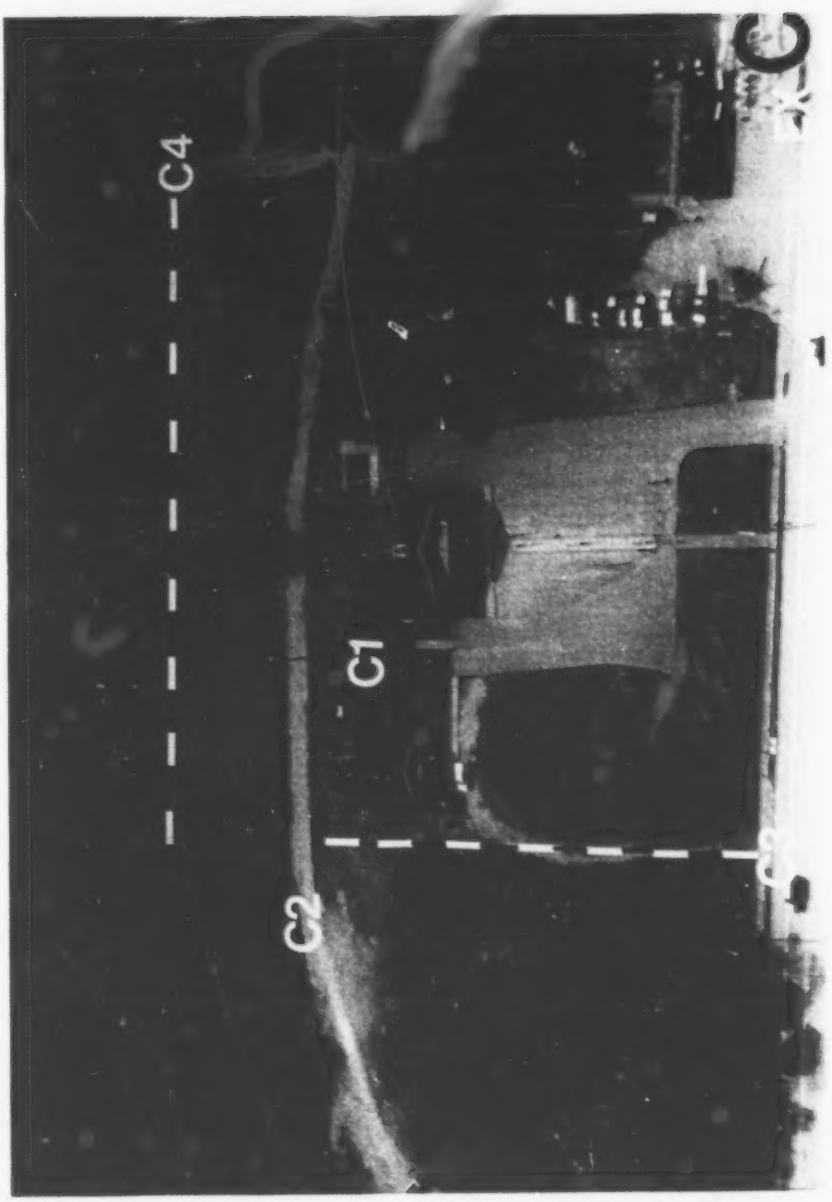
The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

APPENDIX E

APPENDIX F



Supreme Court, U.S.
FILED
OCT 7 2002
OFFICE OF THE CLERK

No. 02-183

IN THE

Supreme Court of the United States

CHARLES MICHAEL PRATER, *et al.*,

Petitioners,

v.

CITY OF BURNSIDE, KENTUCKY,
A Municipal Corporation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY SCOTT LAWLESS
TRAVIS, PRUITT & LAWLESS
Attorneys for Respondents
207 East Mount Vernon Street
P.O. Drawer 30
Somerset, KY 42502-0030
(606) 678-8171

176668

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Free Exercise Clause protects a religious institution's desire to fulfill what it perceives as its spiritual duty to construct facilities on a dedicated public roadway.

PARTIES TO THE PROCEEDING

The identity of the Petitioners have been accurately set forth in the Petition.

The Respondents in this action consist of: the City of Burnside, Kentucky; Richard M. Sadler, as past Mayor of the City, who as of January 2002 was replaced by Delores Sizelove, current Mayor; Conard Bryant, Member of the City Council at the time of the filing of this litigation who as of January, 1999, was replaced by Edgar Hargis, Jr.; Henry D. Coffey, Member of the City Council; Emma Branum, Member of the City Council at the time of the filing of this litigation who as of January, 1999, was replaced by Joyce Gregory; Dean Lovins, Member of the City Council; Delores Sizelove, Member of the City Council at the time of the filing of this litigation who as of January 2002 became Mayor; and David R. Brummett, Jr. Member of the City Council at the time of the filing of this litigation who as of January 2001, was replaced by John Richardson; James Rasnick, member of the City Council, occupying the seat vacated by Delores Sizelove.

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STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the District Court (Petitioner's Appendix B, at 28a-29a, and Petitioner's Exhibit C, at 38a-41a) and the Court of Appeals (Petitioner's Appendix A, at 2a-6a) *Prater v. City of Burnside, Ky*, 289 F.3d 417, at 422-25 (2002).

REASONS FOR DENYING THE PETITION

THE CHURCH HAS FAILED TO ESTABLISH A VIOLATION OF ANY OF ITS CONSTITUTIONAL RIGHTS, AND ABSENT SUCH A VIOLATION, THE "HYBRID-RIGHTS" THEORY FAILS.

The issue presented herein is whether the City's development of, and its refusal to close, a valid and lawfully existing municipal street is a violation of the Church's rights under the Free Exercise, Free Speech, and Freedom of Assembly Clauses of the First Amendment, or constitute an impermissible "taking" under the Takings Clause of the Fifth Amendment.

1. No Violation of First Amendment.

Main Street Baptist Church (hereinafter the "Church") claims that the City of Burnside, Kentucky (hereinafter the "City"), by failing to close a portion of one of its municipal streets known as "Summit Avenue," prevented the Church from enlarging its facilities to accommodate its parishioners who seek to exercise their rights of assembly and expression. This case does not, however, involve the Church's right to freely engage in religious practices. The Church's freedom to worship, speak, and assemble are not being violated by the City's actions or inactions. The Church maintains that

the City's actions somehow infringe upon the desire of the Church to construct buildings upon municipal property. However, the First Amendment does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, are violative of the First Amendment. The crucial word in the Constitutional text is "*prohibit*," not "*infringe*". *Lyng v. N.W. Indian Cemetery Prot. Asso.*, 485 U.S. 439, 99 L. Ed. 2d 534 at 547-48, 108 S. Ct. 1319 (1988). Although some citizens may find certain government activities incompatible with their own search for spiritual fulfillment and with the tenets of their religion, the First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs or activities that do not prohibit the free exercise of religion. *Lyng*, 99 L. Ed. 2d at 548. The Federal Constitution's First Amendment is not to be interpreted as being directed against any form of government action that merely frustrates or inhibits religious practice. *Id.*

None of the Church's rights are being violated by the City's actions or inactions. What may be said to have been "burdened" is the Church's attempt to close a valid, lawfully existing roadway in order to construct Church facilities thereupon, and this is neither accorded nor afforded Constitutional protection. In seeking to close Summit Avenue, the Church is attempting to adversely acquire public property, so that it will thus obtain a larger, undivided tract of land, adjacent to U.S. Highway 27, thereby increasing the value of the Church's real estate holdings. The Church's conduct is not protected by the First Amendment. "The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual

can exact from the government." *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963). The City's actions do not operate as a denial, a prohibition, nor even an infringement of the protected and sacred rights of the Church. The Church is merely being "denied" its efforts to acquire government property, which the Church maintains could be better used for the conducting of religious activity. The rights of the Church and its Members to worship, speak, and practice their religious beliefs have been neither violated nor burdened. Neither the City's actions nor inactions constitute burdens on the exercise of religion. There is no Constitutionally protected activity or practice of the Church that is being prohibited or even burdened by the City. The District Court correctly dismissed the Church's Free Exercise Claims, and the Court of Appeals affirmed the dismissal. The writ should be denied.

2. *No Deprivation of any Cognizable Property Right or Liberty Interest.*

Main Street Baptist Church claims that it has been deprived of liberty and property without due process of law. The District Court disagreed and granted Summary Judgment in favor of the City of Burnside, and determined that the Church failed to establish a property interest in Summit Avenue (Petitioner's Appendix C, 38a-47a), and that the Church failed to establish that it was being deprived of a liberty interest within the meaning of due process. (Petitioner's Appendix B, 27a-37a). As such, the Due Process Clause was inapplicable to the Church's claims. The Court of Appeals unanimously upheld the Summary Judgment.

Claims of denial of Constitutionally required due process must be analyzed in two stages: first, whether there was a cognizable property or liberty interest of which the claimant suffered deprivation, *Board of Regents v. Roth*, 408 U.S. 564,

92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), and second, what procedural steps are necessary to satisfy due process under the circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The City maintains that the Church failed to meet the first requirement, in that there was no recognizable property right or liberty interest of which the Church has been deprived.

The Church bears the burden of demonstrating that it has a cognizable property or liberty interest, of which it is being deprived without due process. Only upon a showing that the Church has such a cognizable property or liberty interest will the inquiry shift to whether procedures that terminated such interest comported with due process. *Maust v. Headley*, 959 F.2d 644 (7th Cir. 1992).

The absence of any First Amendment claim or other liberty interest was found by both the District Court and the Court of Appeals, and was discussed hereinabove.

The Church claims that it is being deprived of a "property right," thus entitling it to the protections of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. As the Supreme Court has noted,

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . . *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972)

The Court of Appeals correctly found that the Church had not been deprived of any property interest, as the Church

had no ownership interest in Summit Avenue. (Petitioner's Appendix A, at 8a-9a). As the Court of Appeals explained, . . . "any reversionary property interest that the Church might have in Summit Avenue Extended is subject to the City's superior right to develop the dedicated roadway for a public purpose." (Petitioner's Appendix A, at 22a.). The only "property interest" or liberty interest claimed by the Church was the opportunity to develop Church facilities upon Summit Avenue, or at least the desire to have the street closed so that it would not interfere with the Church's planned development of its property. To establish a legitimate claim of property interest, more is required than a claimant's abstract need or desire. It has been held that a claimant has no cognizable property interest in a "contemplated development of property." *Marshall v. Bd. Of Cty Com'rs for Johnson Cty.*, 912 F. Supp. 1456 (D. Wyo. 1996). A desire for the closure of a lawfully existing street, merely because its existence frustrates an individual's plan of property development, is not an interest that is or should be recognized or protected. The Court of Appeals correctly found that the Free Exercise Clause did not protect a religious institution's desire to "fulfill what it perceives as its spiritual duty to construct facilities on a dedicated public roadway. . . ." *Prater v. City of Burnside, Ky*, 289 F.3d 417 at 427. (Petitioner's Appendix A, at 13a.).

Main Street Baptist Church has not been deprived of any liberty interest. The term "liberty" does not extend limitlessly to every conceivable individual interest that might impinge on one's pursuit of happiness in a free society, but instead derives meaning from existing rules or understandings that stem from an independent source such as state law. *Roth*, 408 U.S. 564.

There has been no deprivation of the Church's property rights or "liberty interests" within the meaning of the Due Process Clause. The Writ should be denied.

3. This is not a case involving a "hybrid rights" claim.

The Church has filed a 56 page Petition in a case in which the Court of Appeals states the issue to be "Whether the Free Exercise Clause protects a religious institution's desire to fulfill what it perceives as its spiritual duty to construct facilities on a dedicated public roadway. . . . " *Prater v. City of Burnside, Ky*, 289 F.3d 417 at 427. (Petitioner's Appendix A, at 13a). The Church has taken five sentences of dicta contained in one paragraph of the Court of Appeals opinion, and argues that such language "directly conflicts" with opinions issued in others Circuits. The only discussion of the "hybrid rights" argument in the Court of Appeal's opinion follows the Court's conclusion that the development of Summit Avenue and the City's subsequent refusal to close the roadway in no way implicated the Church's rights under the Free Exercise Clause:

> This conclusion also disposes of the Church's claim that the City violated its "hybrid rights," a term that the Church uses to describe a combination of its rights under the Free Exercise, Free Speech, and Freedom of Assembly Clauses of the First Amendment, as well as the Takings Clause of the Fifth Amendment. The Church argues that the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), establishes that strict scrutiny applies where a government act implicates a combination of both the right to the free exercise of religion and any other fundamental constitutional right.

> But absent a violation of the Free Exercise Clause, the Church's hybrid-rights theory necessarily fails. Furthermore, as explained above in Part II.B.1., the Church has not shown that a genuine issue for trial exists regarding any violation of the Takings Clause. Nor does the Church offer any legal authority or compelling argument to explain how the City's refusal to allow the Church to expand its facilities on a dedicated public roadway implicates either the Free Speech or Freedom of Assembly Clauses. Finally, this court has rejected the "assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 240 F.3d 553, 561 (6th Cir.), *cert. granted*, 122 S. Ct. 392 (2001).

Prater v. City of Burnside, Ky, 289 F.3d 417, at 430.

Under the hybrid rights doctrine, a claimant may establish a violation of the First Amendment free exercise clause, even in the case of a neutral law of general applicability, by showing that the challenged governmental action compromises both the right to the free exercise of religion and an independent constitutional right. However, a cognizable hybrid rights claim will not arise where either the free exercise claim or the claim of an independent constitutional right is insubstantial. *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 104 Ed. Law Rep. 106 (1st Cir. 1995) *cert. denied*, 516 U.S. 1159, 116 S. Ct. 1044, 134 L. Ed. 2d 191; *Jensen v. Reeves*, 45 F. Supp. 2d 1265,

135 Ed. Law Rep. 447 (D. Utah 1999); *Swanson By and Through Swanson v. Guthrie Independent School Dist. No. I-L*, 135 F.3d 694, 123 Ed. Law Rep. 1087 (10th Cir. 1998).

There does not appear to be any conflict with the Court of Appeals decision in this case and with those decisions reached by other Circuits. The Ninth Circuit has held that, to assert a hybrid rights claim, a free exercise litigant must make out a "colorable claim" that a companion right has been violated—that is, a "fair probability" or a "likelihood," but not a certitude, of success on the merits. *Miller v. Reed*, 176 F.3d 1202, 163 A.L.R. Fed. 739 (9th Cir. 1999). The Tenth Circuit, in *Swanson By and Through Swanson v. Guthrie Independent School Dist. No. I-L*, 135 F.3d 694, 123 Ed. Law Rep. 1087 (10th Cir. 1998) commenting that the case illustrated the difficulty of applying the hybrid rights exception of *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), declared that whatever the Smith hybrid-rights theory may ultimately mean, it at least requires a "colorable" showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right, such as the right to control the education of one's child.

In the case at bar, Main Street Baptist Church has failed to demonstrate at least a colorable showing of infringement of any recognized and specific constitutional right, much less has it asserted an independently viable claim to a constitutional right other than the right to the free exercise of religion, required by other Circuits. *See, e.g., Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 104 Ed. Law Rep. 106 (1st Cir. 1995). As the Court of Appeals noted, the Church has failed to "offer any legal authority or

compelling argument to explain how the City's refusal to allow the Church to expand its facilities on a dedicated public roadway implicates either the Free Speech or Freedom of Assembly Clauses." The Church's claim does not fail merely because it is neither "viable" nor "colorable," but rather it fails because it is nonexistent. Regardless of whether the Circuits may have different requirements upon a litigant to make a showing of an infringement to a constitutional right, the Church has failed to make at least a colorable showing of infringement of any recognized and specific constitutional right or other liberty interest in its mere desire to fulfill what it perceives as its spiritual duty to construct facilities on a dedicated public roadway. The case at bar is not representative of a true conflict in the opinions of the Circuits, and the Writ should be denied.

The decisions below are clearly correct. The petitioner argues that the Sixth Circuit's position with respect to hybrid rights analysis conflicts with those of other circuits, but fails to establish how the Church has suffered any infringement to its rights under the Free Exercise Clause. Further, there is no important question of constitutional law requiring review by this Court. For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

CONCLUSION

Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JEFFREY SCOTT LAWLESS
TRAVIS, PRUITT & LAWLESS
Attorneys for Respondents
207 East Mount Vernon Street
P.O. Drawer 30
Somerset, KY 42502-0030
(606) 678-8171

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No. 02-183

IN THE

Supreme Court of the United States

CHARLES MICHAEL PRATER, ET AL.,
Petitioners.
v.
CITY OF BURNSIDE, KENTUCKY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Anthony C. Donahue
Ky. Bar No. 85848
DONAHUE LAW GROUP
410-A South Main Street
Somerset, KY 42501
(606) 677-2741 - Phone

Bryan Scott Hicks
Ohio Bar No. 0065022
260 Northland Blvd
Cincinatti, OH 45246
(513) 772-9002 - Phone

Mathew D. Staver
(Counsel of Record)
Florida Bar No. 0701092
Erik W. Stanley
Florida Bar No. 0183504
Joel L. Oster
Kansas Bar No. 18547
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, FL 32750
(407) 875-2100-Phone

11PP

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ARGUMENT

I.

RESPONDENTS DO NOT DISPUTE THE CIRCUIT SPLIT THAT EXISTS REGARDING THE HYBRID RIGHTS THEORY SET FORTH IN *SMITH*.

Respondents (hereinafter "City") do not deny that there is a split among the Circuits regarding the very existence of a hybrid rights exception to the rule announced by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990). Rather, Respondents focus their argument on the merits of this case and argue that Petitioners (hereinafter "Church") do not establish a violation of the First Amendment and thus, there cannot be a "hybrid right" in this case. *See* Brief in Opposition at 1-3. However, this argument is more suited to the merits stage of this case should the Court decide to accept this case for review.

The City never denies the existence of the Circuit split pointed out clearly in the Church's Petition. *See* Petition at 5-13. Nor could the City deny the existence of the split among the Circuit Courts regarding this very important issue.

The City's argument is difficult to understand as it is merely a bald assertion that nothing the City has done has violated the Church's rights under the First Amendment because nothing the City has done makes it more difficult or impossible for the Church to practice its right to the free exercise of religion. Despite the fact that the Church

vigorously disputes this contention, the City's argument does not analyze the challenged action in this case under any of the traditional tests used in the Free Exercise context. It certainly does not analyze the challenged actions under a strict scrutiny analysis and offers no compelling interest for the City's challenged actions in opening and developing Summit Avenue Extended nor does it attempt to argue that the decision was advanced in the least restrictive means available. The City's bald assertion, unsupported and unexplained by any of the traditional tests used to evaluate Free Exercise claims does not mean that the Petition should be denied.

The City's argument that the Church has not established a violation of the First Amendment is different than whether the Church should be given the opportunity to attempt to establish such a violation. In its decision, the Sixth Circuit stated, "Finally, this court has rejected the 'assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny.'" *Prater v. City of Burnside*, 289 F.3d 417, 430 (6th Cir. 2002)(App., 19a)(*quoting Watchtower Bible & Tract Soc'y. of New York, Inc. v. Village of Stratton*, 240 F.3d 553, 561 (6th Cir. 2001), *rev'd. on other grounds* 122 S.Ct. 2080 (2002)). This statement did not even give the Church the opportunity to establish a violation of the First Amendment under a hybrid rights theory, but rather held as a matter of law that the hybrid rights theory as was presented by the Church did not exist in the Sixth Circuit. Even if the Sixth Circuit rejected every one of the Church's First Amendment arguments, it is plausible that the Sixth Circuit would have found in favor of the Church had a hybrid rights theory been accepted and the City's actions been judged under a strict scrutiny standard. However, the Church was never even

given the opportunity to present such a claim because such a claim does not exist in the Sixth Circuit. All the Church seeks in this Petition is the opportunity to argue a hybrid rights theory and to analyze the City's actions pursuant to a strict scrutiny standard. It is not difficult to see that the outcome in this case might have been much different had such a standard been employed by the Sixth Circuit.

The Church is able to present a Free Exercise violation under a hybrid rights theory. If given the opportunity by this Court, the Church will argue that the City's actions in opening Summit Avenue Extended substantially burdened the Church's Free Exercise of Religion. The City had no compelling interest to open Summit Avenue Extended and certainly whatever interest the City had was not advanced in the least restrictive means available. The Church should be given the opportunity to present this argument. It was not given that opportunity, although had the Church been in the Ninth Circuit or another circuit that does recognize the hybrid rights theory, it would have been given that opportunity.

II.

THE REQUIREMENT OF THE MERITS OF THE COMPANION CLAIM TO A HYBRID RIGHTS THEORY IS IN CONFLICT AMONG THE CIRCUITS

The City argues that because the Church's Takings claim was rejected by the Circuit Court, the Church can have no hybrid right claim. However, this ignores the fact that the Church's Takings claim, as well as the other constitutional claims made by the Church, meets the standard for a hybrid

rights claim. The City argues that the Church's Takings claim is not colorable. *See* Brief in Opposition at 3-9. Essentially the City argues that the Church's Takings claim cannot even meet the lowest standard accepted by a circuit court as a threshold for the hybrid rights theory. However, the City's arguments in this regard clearly place too great of a burden on the Church and are nothing more than a *post hoc* rationalization.

It is clear that the Ninth and Tenth Circuits have clearly held that a companion claim to a Free Exercise claim in a hybrid rights context must be at least colorable to raise the level of scrutiny. *See Thomas v. Anchorage Equal Rights Comm'n.*, 165 F.3d 692, 705 (9th Cir. 1999), *reh'g granted and rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000); *American Friends Service Committee Corp. v. Thornburgh*, 961 F.2d 1405, 1409 (9th Cir. 1992), *abrogation recognized on other grounds, Thomas*,165 F.3d 692, 700 n.6 (9th Cir. 1999)(recognizing that *Smith* applies to civil as well as criminal laws); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998).

Under a definition of the word "colorable", the Church has presented a companion claim worthy of appending to a Free Exercise claim to present a hybrid rights theory. Black's Law Dictionary defines "colorable" to mean, "Having the appearance of truth." BLACK'S LAW DICTIONARY 265 (6th ed. 1990). The Ninth Circuit, citing Webster's dictionary, has defined the term "colorable" to mean, "Seemingly valid and genuine." *Thomas*, 165 F.3d at 705 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 449 (1986)). As early as 1828, the term "colorable" was defined to mean, "Giving an appearance of right or justice." AMERICAN DICTIONARY OF

THE ENGLISH LANGUAGE (Webster 1828).

The Courts of Appeals have defined the term "colorable" in similarly generous language. The First Circuit has defined it as, "Seemingly valid or genuine." *BIW Deceived v. Local S6, Industrial Union of Marine & Shipbuilding Workers of America, IAMAW*, 132 F.3d 824, 832 n.4 (1st Cir.1997). The Eighth Circuit has defined the term as, "Not without some merit." *Jensen v. Schweiker*, 709 F.2d 1227, 1230 n. 2 (8th Cir.1983). Similarly, the Ninth Circuit has defined it as not "wholly insubstantial, immaterial, or frivolous." *Boettcher v. Secretary of Health & Hum. Servs.*, 759 F.2d 719, 722 (9th Cir.1985). The Tenth Circuit has defined "colorable" to mean, "Having some possible validity." *United States v. McAleer*, 138 F.3d 852, 857 (10th Cir.1998).

Indeed, the term "colorable" tracks the language used in this Court's decisions regarding awards of attorney's fees to prevailing defendants. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). As stated in the Petition, but worth repeating here, this Court has admonished against *post hoc* rationalizations that a Plaintiff has not presented a colorable claim. *See id.* at 421-22. That is the exercise in which the City engages in its Brief in Opposition. The City essentially argues that because the Sixth Circuit found against the Church on the takings claim and the other constitutional claims, the Church's arguments were not colorable. However, this Court has stated that a Plaintiff's claims are colorable and not frivolous in the attorney's fees context when the claims "deserved and received the careful consideration of both the District Court and the Court of Appeals." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980).

However, the Church has presented several colorable claims that are sufficient to raise the level of scrutiny under the lowest threshold requirement for a hybrid rights claim. Both the District Court and the Sixth Circuit gave careful and detailed attention to each of the Church's claims brought under the Due Process Clause of the Fourteenth Amendment, the Establishment Clause of the First Amendment, and the Takings Clause of the Fifth Amendment. The Sixth Circuit, as well as the District Court, ultimately concluded that the Church did not carry its burden on these claims, but did not decide so until after a detailed and searching inquiry and analysis on each of the claims. The District Court issued two opinions, and issued the second opinion after further briefing and argument. Likewise, the Sixth Circuit issued a twenty-three page opinion dealing with all of the Church's claims and this was done after substantial briefing and argument.

The City focuses entirely upon the Church's Takings claim brought under the Fifth Amendment but says nothing about the Church's other claims brought under the Due Process Clause of the Fourteenth Amendment and the Establishment Clause claim brought pursuant to the First Amendment. The City offers no response as to the characterization of the claims it did not address yet were brought by the Church and addressed by the District and Circuit Courts.

Under any definition of the term, the Church's constitutional claims were colorable and were not frivolous or insubstantial. This is enough to present a hybrid rights claim so as to raise the level of scrutiny and to require the City to demonstrate that the opening and development of Summit Avenue Extended was pursuant to a compelling governmental

interest that is advanced in the least restrictive means.

CONCLUSION

The existence and scope of the hybrid rights exception to the general rule of Free Exercise claims enunciated in *Smith* is clearly presented in this case. The Church merely requests that it be given the opportunity to present a hybrid rights claim and submits that this case would have been decided differently had the hybrid rights claim been accepted by the Sixth Circuit. The Circuit split as well as the resolution of the Circuit split clearly effects this case and would effect the future outcome of this case. The Petition should be granted.

Respectfully Submitted,

Anthony C. Donahue
DONAHUE LAW GROUP
410-A South Main Street
Somerset, KY 42501
(606) 677-2741 - Phone

Bryan Scott Hicks
260 Northland Blvd
Cincinatti, OH 45246
(513) 772-9002 - Phone

Mathew D. Staver
(Counsel of Record)
Erik W. Stanley
Joel L. Oster
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, FL 32750
(407) 875-2100-Phone